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# 1956

## *Queen's Bench Division*

*and on Appeal therefrom in the*

*Court of Appeal*

*and Decisions in*

*The Court of Criminal Appeal*

**Vol. I**

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*Appl.* applied
*Appr.* approved
*C.* considered
*D.* disapproved
*Dist.* distinguished
*E.* explained
*F.* followed
*N.F.* not followed
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**1872**

*Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3 - **Divl.Ct. 53**

**1881**

*Army Act*, 1881 (44 *&* 45 *Vict. c.* 58), *s.* 143 **C.A. 1**

**1885**

*Criminal Law Amendment Act*, 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13 (3) **Divl.Ct. 67**

**1889**

*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *ss.* 1, 26 - - - - **C.A. 682**

**1892**

*Private Street Works Act*, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 9, (1) - **Divl.Ct. 206**

**1906**

*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 55 (2) (*c*) - - **Sellers J. 180**

**1911**

*Coal Mines Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 102 (8) - - - **C.A. 511**

**1916**

*Larceny Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (2) (i) - - - - **Divl.Ct. 439**

**1920**

*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*a*) - - **C.A. 106**

—— —— *s.* 2 (1) (*d*) - - - **C.A. 394**

—— —— *ss.* 12 (1) (*g*), 15 (1) - **C.A. 403**

**1923**

*Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4 (2) **C.A. 403**

**1925**

*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1) (*a*) - - - **C.A. 261**

**1930**

*Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12 (1) - - - **Divl.Ct. 59**

—— —— *s.* 21 (*c*) - - - **Divl.Ct. 241**

**1932**

*Carriage by Air Act*, 1932 (22 *&* 23 *Geo.* 5, *c.* 36), *s.* 1 (1), *Sch.* 1, *c. II*, *art.* 3 (1) (*c*), (2), *c. III*, *arts.* 17, 22 **Ormerod J. 454**

**1932**

*Solicitors Act*, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 57 - - - **Pearson J. 155**

**1933**

*Local Government Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 59 (1) (*a*) - **Divl.Ct. 431**

*Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 - - **C.A. 250**

*Summary Jurisdiction (Appeals) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 38), *s.* 3 (1) **C.A. 682**

**1936**

*Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 24 (1) (3), 293 **C.A. 573**

—— —— *s.* 75 (1) (3) - - **Divl.Ct. 124**

**1937**

*Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (1), 26 (1) - **C.A. 196**

—— —— *s.* 133 - - - **Divl.Ct. 255**

**1938**

*Food and Drugs Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 3, 9 (1) - - **Divl.Ct. 43**

—— —— - - - - - **Divl.Ct. 48**

**1939**

*Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *Sch.* 1 **C.A. 106**

**1945**

*Law Reform (Contributory Negligence) Act*, 1945 (8 *&* 9 *Geo.* 6, *c.* 28), *ss.* 1, 4 **C.A. 551**

**1946**

*National Health Service Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 12 (3), 13 (1), 14 **C.A. 90**

*National Insurance Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 67) - - - - **Devlin J. 73**

—— —— *s.* 5 (1) (*a*) (iii) - **Havers J. 587**

*National Insurance (Industrial Injuries) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 62) **Devlin J. 73**

**1947**

*Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 61, *Sch. III* **C.A. 288**

**1948**

*Agricultural Holdings Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 6 (1) (2) (3) - **C.A. 142**

*Law Reform (Personal Injuries) Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1) **Devlin J. 73**

**1948**

*National Assistance Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 44 (2) - **Divl.Ct. 53**

**1949**

*Landlord and Tenant* (*Rent Control*) *Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 (3) **C.A. 325**

**1952**

*Glamorgan County Council Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c. li*), *s.* 115 (1) (5) - - - - **Divl.Ct. 650**

**1953**

*Local Government* (*Miscellaneous Provisions*) *Act*, 1953 (1 *&* 2 *Eliz.* 2, *c.* 26), *s.* 8 (4) (*b*) - - - - **Divl.Ct. 124**

**1954**

*Housing Repairs and Rents Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 23, 25 (3) (4), 30 **C.A. 394**

—— —— *ss.* 23 (1), 25; *Sch. II*, *paras.* 4, 5, 6 - - - - - **C.A. 702**

**1954**

*Housing Repairs and Rents Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 40 - **Divl.Ct. 229**

*Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (2), 30 (1) (*g*), 57 **C.A. 90**

—— —— *ss.* 23, 24, 25 (1) (2) (3) (4), 43, 69 **C.A. 274**

—— —— *ss.* 24 (1), 26 (3) (5), 29 (3), 35 **C.A. 529**

—— —— *ss.* 30 (1) (2), 31, 33 - **C.A. 131**

—— —— *s.* 30 (1) (*f*) - - - **C.A. 387**

**1955**

*Army Act* (*as re-enacted and amended*) (44 *&* 45 *Vict. c.* 58), *ss.* 45 (1) (5), 46 (1) **C.-M.A.C. 220**

**CANADA**

**1936**

*Water Carriage of Goods Act*, 1936 (1 *Edw.* 8, *c.* 49), *s.* 2, *Sch.*, *arts. III*, *rr.* 2, 8; *IV*, *r.* 4 - **McNair J. and C.A. 462**

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## STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

*Agriculture* (*Maintenance, Repair and Insurance of Fixed Equipment*) *Regulations*, 1948 (*S.I.* 1948, *No.* 184), *Sch.*, *Pt. II*, *para.* 5 - - - **C.A. 142**

*Building* (*Safety, Health and Welfare*) *Regulations*, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 22 (*c*) - - - **C.A. 545**

——— *regs.* 4, 7, 12 - - - **C.A. 551**

*Dock Workers* (*Regulation of Employment*) *Order*, 1947 (*S.R. & O.* 1947, *No.* 1189) - - - - - **C.A. 658**

*Housing Repairs* (*Increase of Rent*) *Regulations*, 1954 (*S.I.* 1954, *No.* 1036), *Schs.* 1, 4, 8 - - - **C.A. 394**

*Pedestrian Crossing Regulations*, 1954 (*S.I.* 1954, *No.* 370), *reg.* 4 - **Divl.Ct. 59**

*R.S.C.*, *Ord.* 16, *r.* 11 - - **Devlin J. 357**

——— *Ord.* 31, *r.* 12, *proviso* - **C.A. 191n.**

*Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connexion with Premises under the Factory and Workshop Act*, 1901 (*S.R. & O.* 1906, *No.* 679), *reg.* 14 **Divl.Ct. 255**

*Town and Country Planning* (*Use Classes for Third Schedule Purposes*) *Order*, 1948 (*S.I.* 1948, *No.* 955) - - **C.A. 288**

# CASES

DETERMINED BY THE

# QUEEN'S BENCH DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

## ON APPEAL THEREFROM
## OR FROM COUNTY COURTS

AND BY THE

# COURT OF CRIMINAL APPEAL

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## NYALI LD. *v.* ATTORNEY-GENERAL.

C. A.

1954
*Dec.* 7, 9, 10;
1955
*Feb.* 21.

**Denning, Morris and Parker L.JJ.**

*Crown—Prerogative—Protectorate—Application in Kenya Protectorate —Grant of franchise of pontage—Formalities not essential—Crown exemption from payment of tolls for military personnel and families —"Military"—Army Act,* 1881 (44 *&* 45 *Vict. c.* 58 (*as amended and re-enacted*) ), *s.* 143.

*East Africa—Kenya Protectorate. Bridge—Toll. Military law.*

N. Ld. built a pontoon bridge linking the mainland at Nyali with the island of Mombasa, both in the Protectorate of Kenya, a territory which, though under the sovereignty of the Sultan of Zanzibar, is administered by British officials under the control of the Government of Kenya.

An Order in Council of 1902, article 15, as amended by one of 1911, provided that jurisdiction within the protectorate should be exercised (so far as relevant) "in conformity with the substance "of the common law . . . subject to such qualifications as local "circumstances render necessary."

The bridge was built under an agreement of October 9, 1929, with the Government of Kenya, which entitled the company to charge tolls for "(*a*) all passenger vehicles (persons limited to six)

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. . . (*d*) foot passengers or persons in excess of six in number "travelling in any vehicle," but provided for exemptions in respect of "military on duty or their equipment, luggage or transport."

During the war the army authorities of the Government of Kenya set up a leave and transit camp for soldiers at Nyali. British soldiers on leave and their wives and children, visiting Mombasa, frequently crossed the pontoon bridge in military vehicles, the drivers of which were on duty. Until 1948 the army authorities agreed to pay certain tolls for military user of the bridge, but from 1948 onwards they ceased payment, claiming that military traffic, including soldiers on leave, wives and children, were exempt from tolls. In an action by the company for a declaration that such tolls were payable, the Crown claimed: (*a*) that the terms of the agreement excluded liability; (*b*) that the Crown, having a prerogative exemption from tolls, was not liable to pay tolls for the use of the bridge; and (*c*) that by an application of section 143 of the Army Act a freedom from liability resulted:—

*Held*, that the word "military" was not confined to local troops, but included all soldiers of the Queen; that military vehicles were exempt from the payment of tolls when driven by a soldier on duty; and that (*per* Morris and Parker L.JJ.) the first six persons travelling in such a vehicle (including the driver) were exempt from tolls whether they were on duty or not, and only an excess of six, if not on duty, were chargeable.

*Per curiam*: (1) The jurisdiction of the Crown in the Protectorate of Kenya was to be ascertained by looking at the jurisdiction in fact exercised in that territory under Orders in Council and other Acts of the Crown which the courts would not allow to be challenged (*Sobhuza II* v. *Miller* [1926] A.C. 518; 42 T.L.R. 446 applied).

(2) The permission to charge toll for the use of the pontoon bridge given by the Government of Kenya to N. Ld. was a prerogative grant of a franchise of pontage.

(3) The Crown was not exempt from payment of tolls by virtue of any prerogative of exemption.

*Weymouth Corporation* v. *Nugent* (1865) 6 B. & S. 22 distinguished.

(4) The Crown was not exempt by reason of section 143 of the Army Act.

Decision of Hilbery J. reversed.

APPEAL from Hilbery J.

Mombasa, an island off the coast of Kenya, is connected to Nyali on the mainland by a pontoon bridge. Both Mombasa and Nyali are in the Protectorate of Kenya, which is a strip of land along the east coast of Africa about 200 miles long and 10 miles wide. Inland behind the strip lies Kenya Colony. The jurisdiction of the British Crown in the Kenya Protectorate is derived from an agreement made in 1895 between Great Britain and Zanzibar. By this agreement the Sultan of Zanzibar entrusted the administration of the area to officers appointed by the British Government, who were responsible only to the British Government and not to the Sultan. These officers were to have full powers in regard to the executive and judicial administration, and the levy of taxes, duties and tolls; and they were to have control over all roads, waterways and other means of communication, but it was expressly provided that the agreement should not affect the sovereignty of the Sultan in the territory. In Kenya Colony the jurisdiction of the British Crown is derived from an act of annexation in 1920 and the sovereignty is in the British Crown. By an Order in Council of 1920 the Governor of Kenya Colony is the Governor of Kenya Protectorate and exercises the powers and jurisdiction of the Crown in that territory.

The pontoon bridge connecting Mombasa and Nyali was built by the plaintiff company, Nyali Ld., under an agreement of October 9, 1929, with the Government of Kenya, whose consent was necessary because the bridge had to cross the navigable waters of Mombasa Harbour. By the agreement the company were to build the bridge, together with the approaches for 100 feet on either side, and the Government were to build the roads connecting the bridge with the main roads on either side. Upon completion permission of the Government was to be obtained to open the bridge.

The relevant clauses of the agreement were as follows: Clause 12: " . . . subject to the payment of tolls hereinafter " laid down the bridge shall be kept open to every vehicle the " weight of which when laden is less than five tons and to all " foot passengers and animals . . . The Government by its fully " authorized agents may for public purposes require the company " to allow vehicles, the weight of which when laden does not " exceed ten tons, to cross the bridge."

By clause 13 the bridge was to be kept open for traffic as aforesaid continuously except when closed for repair or by order of the Director of Public Works. The responsibility for repair rested with the company, who were entitled to charge tolls.

By clauses 22, 23 and 24 of the agreement the rights and limits of the company as to the charging of tolls were laid down as follows:—

Clause 22: Tolls payable by members of the public for crossing the bridge shall not exceed the following:—

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| | Shillings | Cents. |
|---|---|---|
| (*a*) All passenger vehicles (persons limited to six) .. .. .. | 2 | 00 each |
| . . . . . | . | |
| (*d*) Foot passengers or persons in excess of six in number travelling in any vehicle .. .. .. .. | | 10 ,, |
| . . . . . | . | |
| (*g*) Vehicles for commercial purposes loaded or empty not exceeding 1½ tons .. .. .. .. | 2 | 50 ,, |
| . . . . . | . | |
| (*h*) Vehicles exceeding 1½ tons but not exceeding 5 tons (limit 5 tons without permission as in clause 12) .. | 4 | 00 ,, |

Clause 23: No tolls shall be levied in respect of police or military on duty or their equipment, baggage or transport.

Clause 24: Tolls payable by Government or Government servants on duty other than those provided under clause 23 shall be those specified in clause 22 less 25 per centum.

The agreement was sealed by both parties, the Governor of Kenya affixing the public seal and the company its common seal.

At the outbreak of the late war most of the lorries in Mombasa were commandeered for military on duty and no tolls were payable by them. The holiday traffic to Nyali beach dropped to nothing, and the receipts became insufficient to pay for the maintenance of the bridge. On January 4, 1940, as a result of representations by the company, the Army authorities agreed that military traffic should pay half rates and made certain other concessions. Subsequently the Army authorities set up a military leave and transit camp at Nyali, the only way from which into Mombasa was across the pontoon bridge. British soldiers on leave and their families and friends, therefore, frequently crossed the bridge riding in military vehicles the drivers of which were on duty. In 1943 it was agreed that a lump sum of £600 a month should be paid to cover all military user.

In August, 1948, the Army authorities refused to continue payments, claiming that military traffic, including the vehicles carrying soldiers on leave and their families and friends, was exempt from tolls. The company then commenced proceedings in this country against the Attorney-General, as representing the Crown, for " a declaration that members of the military forces of " H.M. Government and their vehicles (other than the military "forces and vehicles of the Kenya Government) are not exempted "from liability to tolls . . . in respect of the use of the Nyali "bridge. . . ."

On July 28, 1954, Hilbery J. gave judgment for the company, holding that the words "military on duty" in clause 23 of the agreement of October 9, 1929, were to be construed as meaning the military forces of the Government of Kenya, and not the Imperial troops in toto, that the prerogative powers of the English Crown were not exercisable in the Protectorate of Kenya, the sovereignty of which was vested in the Sultan of Zanzibar and not in the Crown of England, and that for this reason the question of Crown exemption from tolls upon a prerogative grant of a franchise of pontage did not arise. He also held that no exemption from tolls arose by virtue of section 143 of the Army Act.[1] From that decision the Crown appealed.

*Kenneth Diplock Q.C.* and *Rodger Winn* for the Crown. The constitutional position in Kenya Protectorate is to be ascertained by reference to the Foreign Jurisdiction Act, 1890, and the Orders in Council made thereunder. The preamble of the Act is of importance; treaty, capitulation, grant, usage and sufferance are sources of jurisdiction according to the preamble. It is submitted that the agreement with the Sultan of Zanzibar falls within the wording of the statute, being a treaty or a grant. By the words of section 1 jurisdiction may be exercised in the same and as ample a manner as if the territory had been conquered or ceded. Jurisdiction once acquired is, therefore, as far as the courts of this country are concerned, unlimited. [Sections 2, 3, 4, 6, 8, 11 and 12 of the Act were referred to.] Where there is no constitution the power of the Crown is a prerogative power and is unlimited, but by the grant of a constitution the Crown surrenders its prerogative powers: *In re the Lord Bishop of Natal.*[2] Prerogative power may be exercised by Orders in Council or by proclamation. The prerogative of the Crown is rightly defined as the residue of powers left in the Crown. It has treaty making powers in the conduct of foreign affairs and in exercising power in foreign territory and those are prerogative powers. The foundation of the government in this protectorate, as in any, is the power of the prerogative, supplemented, where necessary, by the Foreign Jurisdiction Act.

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[1] Army Act, s. 143 (1): "All "officers and soldiers of the regular "forces on duty or on the march; and "their horses and baggage; and all "prisoners under military escort; "and all carriages and horses belonging to His Majesty or employed in "His military service, when conveying any such persons as above "in this section mentioned, or "baggage or stores, or returning "from conveying the same, shall be "exempted from payment of any "duties or tolls on embarking or "disembarking from or upon any "pier, wharf, quay, or landing-place, "or in passing along or over any "turnpike or other road or bridge, "otherwise demandable by virtue "of any Act of Parliament already "passed or hereafter to be passed, or "by virtue of any Act, Ordinance, "order, or direction of the legislature "or other authority in a colony."

S. 190 (23A): "The expression "'colony' means any part of His "Majesty's dominions exclusive of "the United Kingdom, and of any "Dominion, and includes any British "protectorate."

By article 1 of the East Africa Order in Council, 1897,[3] the power of the Crown was subject to any treaties for the time being in force, and the word treaties includes any convention, agreement or arrangement with any king, people or government. Article 11 provided that the law in the protectorate should be the common law and statute law of 1897 in force in England in so far as Indian law did not apply. The Order of 1897 was revoked by the East Africa Order in Council of 1902,[4] which in turn was amended by the Order in Council of 1911.[5] The reference to treaties for the time being in force disappeared but, by article 15, jurisdiction was to be exercised in conformity with the Indian Acts and, where these did not apply, with the substance of the common law, the doctrines of equity and the statutes of general application in force in 1897. It is submitted that the reference to "the limits of "His Majesty's jurisdiction" means geographical limits. These enactments indicate, it is contended, that at the relevant date the Crown had power to grant a franchise of pontage in Kenya Protectorate and that in regard to this the agreement with the Sultan is nihil ad rem. In so far as any limitations upon the power of the Crown in the Sultan's territory were imposed by that treaty those limitations have, as a matter of usage and sufferance, disappeared. The power of the Crown to grant a franchise of pontage is amply covered by the powers accorded to the Crown in the agreement, but that is quite irrelevant, since the right arises under powers acquired by usage and sufferance, the common law in England in 1897 having preserved the right of the Crown to grant such a franchise.

An Order in Council of 1906 [6] gave to the Governor of Kenya all the governmental powers that belong to his office not required to be made by Ordinance and the like. The residue of power is, therefore, in the governor. By the Kenya Protectorate Order in

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[2] (1864) 3 Moo.P.C.C.(N.S.) 115.

[3] S.R. & O., 1897, No. 575.

[4] S.R. & O., 1902, No. 661.

[5] S.R. & O., 1911, No. 243.

[6] S.R. & O., 1906, No. 806.

Council, 1920,[7] the territory other than that in the mainland strip was annexed and became a colony and everything not in the colony was part of the protectorate. By article 5 the governor was given all such powers and jurisdiction as His Majesty had or might have. Accordingly, all prerogative powers not taken away by the substance of the common law or by Ordinances vested in the governor.

If a man builds a private road and allows persons to use it for a fee, he cannot enforce payment of the fee against someone who uses it without payment. There would merely be right to sue in trespass, and if a notice were put up, there might be a contract. In the present case there is no contract, the Crown having expressly stated that it is not under any obligation to pay tolls, and therefore the basis of the right to charge tolls is a grant of franchise or nothing—it must be a basis of the plaintiff's case that the Crown has a right to grant a franchise of pontage, and that is how the statement of claim is framed. According to *Sobhuza II* v. *Miller*[8] the right of the Crown is not limited in a protectorate so far as the courts of this country are concerned, and it is submitted that the agreement with the Sultan is quite irrelevant to the question now before this court.

The Government of Kenya means the Crown acting through the appropriate organ, in other words, the governor acting on behalf of the Queen. The agreement of October 9, 1929, was made with the Government and was sealed; the governor is responsible for the use of the seal and the agreement was therefore made with him acting on behalf of the Crown. Once the Crown has exercised its powers the result may not be challenged by the courts. *Rex* v. *Earl of Crewe*[9] and *In re Southern Rhodesia*,[10] relied upon in *Sobhuza II* v. *Miller*,[11] are authorities for this proposition.

As to the franchise of pontage, the Crown has a prerogative power to grant a right to take tolls or an exemption from paying tolls. The Crown is prima facie not liable to pay tolls. This prerogative power has nothing to do with territorial ownership. [Reference was made to Halsbury's Laws of England, vol. 6, para. 744; Bacon's Abridgment (1759), vol. 6, p. 481; Chitty's Treatise on the Law of the Prerogatives of the Crown (1820), ch. 14, p. 376, and Viner's Abridgment (1742), Prerog. M, b, pl. 19.] The

[7] S.R. & O., 1920, No. 2343.

[8] [1926] A.C. 518; 42 T.L.R. 446.

[9] [1910] 2 K.B. 576; 26 T.L.R. 439.

[10] [1919] A.C. 211; 34 T.L.R. 595.

[11] [1926] A.C. 518; 42 T.L.R. 446.

prerogative exemption of the Crown from paying pontage extends to the property and servants of the Crown: *Westover* v. *Perkins*,[12] in which it was held that a carriage transporting one of the Queen's servants or his family was not liable to toll. In *Weymouth Corporation* v. *Nugent*,[13] where the Crown was acting through one of its servants, the exemption was based on statute, but the franchise of pontage was discussed. Military personnel are exempted from statutory tolls by the Army Act and from franchise tolls by virtue of the prerogative of franchise. *Attorney-General* v. *Proprietors of Selby Bridge*,[14] in which it was held that the exemption extended to an officer in a motor-car which he was authorized to drive on duty, turned on an exemption in the Army Act which is in substantially the same terms as the exemption in the agreement of October 9, 1929.

Soldiers of the King's African Rifles stand in no different position from other soldiers of the Crown, and it is submitted that the word "military" in clause 23 of the agreement means all the soldiers of the Queen. By an East Africa Protectorate Ordinance of 1912,[15] dealing with the establishment of the King's African Rifles, all officers have the King's commission, the Governor of Kenya is the commander-in-chief of the regiment and each member takes the oath of allegiance to the Crown in the usual form. The police are servants of the Government and the troops of the King's African Rifles are servants of the Crown.

The question whether the prerogative powers exist in a protectorate is of importance in relation to the construction of the agreement of 1929. It is submitted that the effect of the agreement was to dedicate the bridge as a public highway, subject to terms. If it were not a public highway, then it would be a public nuisance. Unless there is a grant of a franchise of pontage the agreement is ultra vires. The agreement is under solemn form of seal—charters and Letters Patent do not exist in Kenya—and if the substance of it is the grant of a franchise of pontage, then it should be given that effect. One must look at the meaning of the words as they stand, and particularly at clause 24, to see whether there is anything therein to cut down the ordinary meaning of the word "military." Contrary to the view of the trial judge, clause 23 must not be read as a proviso to clause 24. It is submitted that on the true construction of the agreement a passenger in an exempted vehicle is also exempt because he is not charged. Every person is entitled to use the highway unless there is some express provision whereby he shall be charged.

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[12] (1859) 2 E. & E. 57.

[13] (1865) 6 B. & S. 22.

[14] [1921] 1 K.B. 149; 36 T.L.R. 848.

[15] No. 15 of 1912, as amended.

Further, the military use of the bridge is exempt from the payment of tolls by virtue of the provisions of the Army Act, which applies in a protectorate by virtue of section 190 (23A). Officers and soldiers and their conveyances are thereby exempted from the payment of tolls demandable by virtue of any Act, Ordinance, order or direction of the legislature or any other authority in a colony, and colony includes a protectorate. It is submitted that the agreement of 1929 amounted to a direction of the Governor of Kenya.

*John Foster Q.C.* and *Mark Littman* for the company. The extent of the prerogative powers in the protectorate affects the construction of the agreement. In this case there is an exemption created by the agreement itself. An exemption from a prerogative grant would stand in a different light. Statutory grants and exemptions may also stand in a different light from purely prerogative grants and exemptions. The exemption of the Crown in the agreement of 1929 is limited to persons "on duty." The prerogative is uncomfortably wide; if the argument for the Crown is correct, a member of the Colonial Office on holiday in Kenya may be exempted from tolls. "Military" cannot include the Royal Navy and Royal Air Force, and their omission is explained by the fact that, at the time of the agreement, there was no local force in Kenya of other than of a military description.

As to the prerogative itself, it has been argued for the Crown that section 1 of the Foreign Jurisdiction Act, 1890, gives the Crown unrestricted jurisdiction. Professor W. E. Hall's Treatise on the Foreign Powers and Jurisdiction of the British Crown, pp. 11 and 12, states that according to the Act the Crown can exercise its jurisdiction as if in a conquered or ceded territory, but that it does not enlarge the jurisdiction of the Crown. *Secretary of State for Foreign Affairs* v. *Charlesworth*[16] shows that jurisdiction under the Act is limited by treaty.

The prerogative of the Crown in the protectorate is, it is submitted, excluded by the sovereignty of the Sultan of Zanzibar. The agreement between the British and the Sultan has to be examined to see what powers can be exercised, and amongst these is the power to levy taxes, duties and tolls. These powers would be ultra vires the Foreign Jurisdiction Act if the argument for the company is correct, but it is not necessary to depend on this, for it will be shown that the Orders in Council at the time of the treaty contain limitations and that the prerogative of franchise of pontage was not brought into Kenya at all; the right to exercise the prerogative of pardon might have been excluded by the treaty had it not been specifically referred to in the Order in Council. The policy of the Order in Council of 1911,[17] as expressed in article 15, was to apply a highest common factor of law which the inhabitants of the protectorate would understand, and it is submitted that the prerogative as applied to the grant of a franchise of tolls is for this reason excluded. The word "limits" means the limits imposed by the treaty and refers to juridical limits; the geographical limits of the jurisdiction were set out in the Order in Council of 1902.[18] It is contended that the exercise of prerogative powers by the Crown is excluded by the agreement itself, by the treaty and by the Orders in Council. *Sammut* v. *Strickland*[19] and *Rex* v. *Earl of Crewe*[20] show that the prerogative of the Crown is limited by the terms of cession and does not carry any right to legislate. The full power of the Crown to legislate would apply only where a country is a barbarous one. *Sobhuza II* v. *Miller*[21] refers to such a country under the protection of the Republic of South Africa. The right to charge tolls arises from the fact that the land is in British ownership. That the Government could make an agreement with an individual as to the charging of tolls is sufficiently covered by the common law without importing the archaic practice of granting a franchise.

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[16] [1901] A.C. 373.

According to *Hammerton* v. *Dysart*[22] tolls are classified as tolls traverse, where a toll is charged for passing over the private soil of another, and tolls thorough, where the charge is for passing over a highway and the owner of the right to tolls has no ownership of the soil. Tolls traverse are rateable and must be paid by the Crown: Ryde on Rating, 8th ed., p. 483; *Willion* v. *Berkley*.[23]

It is, however, submitted that highways, franchise, tolls traverse and thorough are all highly artificial in a country which, according to *Secretary of State for Foreign Affairs* v. *Charlesworth*,[24] has imported Mahomedan law.

The Crown made an agreement and specifically charged Crown servants with three-quarter payments; this cannot be said to be ex abundanti cautela. For this reason *Westover* v. *Perkins* [25] is to be distinguished; there the right to charge was statutory and the Crown was not a party.

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[17] S.R. & O., 1911, No. 243.

[18] S.R. & O., 1902, No. 661.

[19] [1938] A.C. 678; 54 T.L.R. 1080; [1938] 3 All E.R. 693.

[20] [1910] 2 K.B. 576.

[21] [1926] A.C. 518.

[22] [1916] 1 A.C. 57.

[23] (1562) 1 Plowd. 223.

[24] [1901] A.C. 373.

It is submitted that the agreement excludes the Army Act, dealing as it does with the matters covered thereby. Alternatively, the right to charge tolls in the present case was not given by an order or direction but by an agreement; this is distinguishable from an order or direction which imports sanctions.

The extent of exemption of passengers is limited to where a vehicle has paid toll, and the view should not be taken that, because a driver and vehicle are on duty, soldiers on leave who are inside the vehicle are on duty. In *Craig* v. *Nicholas* [26] it was held that Crown exemption from the payment of tolls did not extend to the private carriage of an officer used for his convenience when on duty.

*Diplock Q.C.* in reply. It is the company's case that the Government of Kenya is the other party to the agreement. There is no question of the Attorney-General on behalf of the Crown being party to the agreement, yet the whole of the argument of counsel for the company is based on the assumption that he is a party. On this basis it has been sought to say that a term for reasonable tolls should be imported into the agreement; to do so would require the rewriting of the whole agreement.

It has been sought to argue from *Sammut* v. *Strickland* [27] that the effect of section 1 of the Foreign Jurisdiction Act is to limit the jurisdiction of the Crown in accordance with any treaty which may have existed at the time. It is submitted that the word "conquest" dispels any limitations and that the Crown has unlimited jurisdiction if it wishes to exercise it as a matter of law. The decision in *Sobhuza II* v. *Miller* [28] may be put upon two grounds, that the act of the Crown was an act of State, that is to say, an act of prerogative outside the realm, or that it was an act under the Foreign Jurisdiction Act, section 1 of that Act having the wide construction I have indicated and not the narrow one postulated in Hall. *Secretary of State for Foreign Affairs* v. *Charlesworth* [29] concerned a situation in which treaties were expressly incorporated in the Order in Council and does not throw light on the position where, as here, the treaty was not brought into the local law; moreover, the subject-matter was quite different from that of the present case.

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[25] 2 E. & E. 57.

[26] [1900] 2 Q.B. 444.

[27] [1938] A.C. 678.

[28] [1926] A.C. 518.

[29] [1901] A.C. 373.

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The treaty with the Sultan cannot be looked at to cut down the power of the Crown, for it is only equivalent to political or diplomatic negotiations. Compensation treaties with foreign States give rise to no rights of action in the person injured. If the Crown departed from this treaty, it would merely be doing an act of State; only if the treaty has been embodied in an Order in Council can the courts take cognizance of it. Reliance is strongly placed on *Rex* v. *Earl of Crewe*,[30] in which all three judges were agreed that under the Foreign Jurisdiction Act the power of the Crown is absolute. The purport of the judgments is that sections 1 and 11 read together give to an Order in Council the same effect as if it were legislation. It is clear from *Sobhuza II* v. *Miller*[31] that an extension of British jurisdiction by Order in Council may be referred to the exercise of power by an act of State. The Crown cannot, except by statute, deprive itself of the right to make Orders in Council even if inconsistent with previous Orders in Council. *North Charterland Exploration Co. (1910) Ld.* v. *The King*[32] followed *Sobhuza II* v. *Miller*.[33] The function of the courts is to look at the instrument by which the Crown has manifested its intention as to the exercise of power in a protectorate in order to see how it has in fact exercised it. That is the limit of the inquiry the court can make. The Order in Council may contain (i) a direct exercise of a legislative power, for instance, where the Crown has said that common law shall apply, sometimes it says that a treaty shall have the effect of law, and (ii) a delegation by the Crown of a portion of its powers to various organs. The inquiry before the court in such cases is whether the powers purported to be exercised fall within the powers purported to be delegated.

The Order in Council of 1897[34] expressly brought in the treaty, that of 1911[35] omits the treaty, and one should not read the word "limits" as bringing in that which is clearly omitted. It matters not for my present purpose whether "limits" has the wider or narrower meaning. Territorial sovereignty in a protectorate is never in the Crown. This Order in Council was drafted after *Rex* v. *Earl of Crewe*,[36] and that case, so far as the courts were concerned, went the whole way.

As regards the construction of the words "the substance of

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[30] [1910] 2 K.B. 576.

[31] [1926] A.C. 518.

[32] [1931] 1 Ch. 169.

[33] [1926] A.C. 518.

[34] East Africa Order in Council, S.R. & O., 1897, No. 575.

[35] East Africa Order in Council, S.R. & O., 1911, No. 243.

[36] [1910] 2 K.B. 576.

"the common law," the rule that innkeepers are insurers of their guests' property applies in Kenya and that is a much more technical rule than the law as to highways.

The Crown could by apt words have made Imperial troops or any other of its servants subject to toll and would have needed express words to do this. Here express words have been used to make some of them subject to toll. There is an express charging of a limited class; this assists the contention that the exemption applies to the others.

As to section 143 of the Army Act, it is submitted that the grant of a franchise in a protectorate is the exact equivalent of a statute creating rights and liabilities.

*Cur. adv. vult.*

1955. February 21. The following judgments were read.

DENNING L.J., having stated the facts, continued: Strangely enough this case has involved the court in complex questions as to the exercise of the Crown prerogative within a protectorate. The Crown says that the right of the bridge company to take tolls is derived from the Crown prerogative; and that, corresponding to this prerogative, there is a Crown exemption whereby all servants of the Crown are exempt from paying tolls: and that the agreement with the bridge company must be construed so as to give effect to this exemption to its full extent.

I. *The right to charge tolls.*

In order to do justice to the argument of the Crown it is necessary to inquire by what right the bridge company charge tolls to the persons who use the bridge. If the bridge had been built in England the common law would have provided an answer. In former times there were many cases where a man set up a ferry or made a bridge to cross a river or an arm of the sea. It was usually done to connect two highways so as to save a long journey round. In such a case it is well settled that the owner of the ferry or the bridge cannot of his own head impose a toll upon the people who use it. The reason is because it is a thing of public benefit and use; and it ought, therefore, to be under public regulation. He must get lawful authority to levy a toll; and the only authority recognized for this purpose is a Crown grant of a franchise of tolls, or an Act of Parliament. The toll charged must not exceed the amount specified in the Crown grant or in the statute; and if none be specified, it must be reasonable and moderate. All this is to be collected from *Darcy*

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v. *Allin* (the Case of Monopolies)[1]; Sir Matthew Hale's treatise de Jure Maris[2]; Lord Macnaghten's judgment in *Simpson* v. *Attorney-General*,[3] and Lord Parker's judgment in *Hammerton* v. *Dysart (Earl)*.[4] There are no modern instances of a Crown grant of franchise, but it is one of the prerogatives of the Crown; and in order to be valid it must be made by matter of record, that is to say, by Royal Charter or by Letters Patent under the Great Seal.[5]

Such being the position in England, how stands it in the Kenya Protectorate? The important thing to notice is that the Kenya Protectorate is not under the sovereignty of the Queen. It is under the sovereignty of the Sultan of Zanzibar; and it is said with much force that the Royal Prerogatives of the Crown of England cannot run in a place where the Queen is not sovereign.

[His Lordship stated the facts as to the geographical situation and status of the Kenya Protectorate and continued:] The difference in law between Kenya Colony and Kenya Protectorate is this: In Kenya Colony the jurisdiction of the British Crown is unlimited; but in the Kenya Protectorate it is only limited. It is limited to such jurisdiction as the Crown has acquired by treaty, capitulation, grant, usage, sufferance and other lawful means. It was suggested to us that the Foreign Jurisdiction Act, 1890,[6] extended this limited jurisdiction so as to make it unlimited. I do not agree. That Act does not extend the jurisdiction of the Crown at all. It only provides for *the manner* of exercising it. It says that the Crown can exercise its jurisdiction in the protectorate "in the same and as ample a manner" as it exercises its jurisdiction in a country which has been conquered or ceded. This means that the Crown can exercise its jurisdiction by means of Order in Council or otherwise, just as it can in a conquered or ceded country, but it does not enlarge the area of its jurisdiction. This was the view expressed by Professor W. E. Hall in his Treatise on the Foreign Powers and Jurisdiction of the British Crown.[7] It is supported by section 4 of the Act of 1890 (which says that if any question arises as to the existence or extent of the jurisdiction of Her Majesty a

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[1] (1602) Noy 173, 176.

[2] pp. 6, 7 and 77.

[3] [1904] A.C. 476, 482, 483; 20 T.L.R. 761.

[4] [1916] 1 A.C. 57, 78; 31 T.L.R. 592.

[5] Chitty, Prerogatives of the Crown, p. 389.

[6] 53 & 54 Vict. c. 37.

[7] pp. 11, 12.

Secretary of State shall decide the question): and also by the Order in Council of 1911[8] which applies English law in the Protectorate so far as "the limits of His Majesty's jurisdiction "permit."

Although the jurisdiction of the Crown in the protectorate is in law a limited jurisdiction, nevertheless the limits may *in fact* be extended indefinitely so as to embrace almost the whole field of government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan. The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus, if an Order in Council is made affecting the protectorate, the courts will accept its validity without question: see *Sobhuza II* v. *Miller and Others*.[9] It follows, therefore, that in the present case we must look, not at the agreement with the Sultan, but at the Orders in Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction. I turn, therefore, to consider them.

In the first place there is an Order in Council of 1920[10] which has brought the Kenya Protectorate very much within the orbit of Kenya Colony. The governor of the colony is also the governor of the protectorate and is entitled to all the powers of the Crown therein. The executive council of the colony is also the executive council of the protectorate. The legislative council of the colony legislates, not only for the colony, but also for peace, order and good government of the protectorate. And so forth. None of those provisions can be challenged in the courts.

In the second place there is an Order in Council which prescribes the law to be applied within the protectorate. It is article 15 of the Order in Council of 1902 as amended by the Order of 1911.[11] It provides that the civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Indian Acts and "so far as the same shall not extend or "apply shall be exercised in conformity with the substance of "the common law, the doctrines of equity and the statutes of "general application in force in England on August 12, 1897. . . . "Provided always that the said common law, doctrines of equity "and statutes of general application shall be in force in the "Protectorate so far only as the circumstances of the Protectorate "and its inhabitants and the limits of His Majesty's jurisdiction "permit, and subject to such qualifications as local circumstances "render necessary."

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[8] S.R. & O., 1911, No. 243.

[9] [1926] A.C. 518, 528; 42 T.L.R. 446.

[10] S.R. & O., 1920, No. 2343.

[11] S.R. & O., 1902, No. 661, and S.R. & O., 1911, No. 243.

Applying that Order in Council I think that the prerogatives of the Crown apply within the protectorate, for they are within the very "substance of the common law." Joseph Chitty in his classic work on the Prerogatives of the Crown (1820) says [12] that these prerogatives "form part of, and are, generally speaking, "as antient as the law itself."

There are, however, the provisos to be considered. The first provides that the common law is to be in force "so far only "as the circumstances of the Protectorate and its inhabitants "and the limits of His Majesty's jurisdiction permit." This proviso does not oust the prerogatives of the Crown. It is plain that the jurisdiction of the Crown in the protectorate has been extended so far as to include everything connected with the peace, order and good government of the area; and the Crown prerogatives certainly come within that description. Moreover, if it were relevant, I would add that the power to grant a franchise of tolls comes within the very words of the agreement with the Sultan, for it confers on the officers of the British Government "full powers in regard to the levy of tolls."

The next proviso provides, however, that the common law is to apply "subject to such qualifications as local circumstances "render necessary." This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom.

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[12] p. 4.

So in this case, I think that the prerogative of the Crown to grant a franchise of tolls applies in the Kenya Protectorate, but with this qualification, that the grant need not be made by matter of record, such as a Charter or Letters Patent, nor does it need any formal enrolment. By cutting out these technicalities we are left for the protectorate with the simple principle that, if a person makes and maintains a bridge connecting two highways, he cannot of his own head impose a toll on the persons using it: but the governor and the Executive Council (that is, the government) can grant him the right to take a toll. They can grant him this right by agreement in writing without any formalities. The tolls must not exceed those specified in the agreement, or, if none be specified, they must be reasonable and moderate.

Applying this principle, I am of opinion that the right of Nyali Ld. to charge tolls is derived from the agreement made with them by the Government of Kenya; and this agreement in turn derives its authority from the common law as applied in the protectorate. If any person should use the bridge and not pay the toll permitted by law he is liable in an action of debt. The debt does not arise out of any contract by him. It is imposed by law.

II. *Crown Exemption.*

The Crown claims that, by the common law, all the servants of the Crown are exempt from paying tolls for crossing a bridge. I do not think this contention is correct. It depends on whether the toll is a toll thorough or a toll traverse. The Crown was exempt from paying toll thorough, but not from toll traverse: see *Lord Berkley's Case*.[13] If a man makes a new bridge where there was none before it is a toll traverse; but if he only repairs an old bridge where the public have crossed from time immemorial, it is a toll thorough: see *per* Lord Parker in *Hammerton* v. *Dysart*.[14] I should have thought that the toll for crossing this

[13] (1562) 1 Plowd. 223, 236.

[14] [1916] 1 A.C. 57, 78, 79.

pontoon bridge together with its approaches (which are private property) would have been regarded by the common law as a toll traverse. (It is interesting to notice that the toll for crossing the wooden bridge at Ware over the River Lee was a toll traverse: see *Steinson* v. *Heath*,[15] *Reg.* v. *Marquis of Salisbury*,[16] and so also is the toll for crossing the floating bridge at Southampton over the River Itchen, for the Crown has no exemption from it: *Ward* v. *Gray*.[17]) If the toll in this case was a toll traverse, then the Crown has no exemption. Even if it was a toll thorough, I can see many difficulties in saying at the present day what is the extent of the Crown exemption, particularly to what servants it extends and for what purposes. I decline, however, to go into all these subtleties. They are quite unsuited to the Kenya Protectorate. Toll thorough and toll traverse have as little place there as they have in modern England. The Order in Council authorizes the courts to make the necessary qualifications to suit local circumstances. Making these qualifications, I am of opinion that in the Kenya Protectorate the Crown has no exemption from tolls except such as is expressly given to it by the agreement granting the right to tolls.

After all this long discussion, therefore, I have come to the conclusion that the issues in this case fall to be determined on the construction of the agreement and nothing else. To that I now turn.

### III. *The Agreement.*

[His Lordship referred to the relevant clauses of the agreement of October 9, 1929, and continued:] The important clauses are clause 22, which clearly imports that tolls shall be payable by members of the public for crossing the bridge, but says that they shall not exceed the specified maxima; and clause 23, which exempts military on duty or their equipment, baggage or transport. I do not think the exemption in clause 23 is confined to local troops, such as the King's African Rifles. The word "military" when used by British folk includes all the soldiers of the Queen, whether raised locally or coming from the United Kingdom or any other part of Her Majesty's Dominions. But this does not mean that all the traffic to and from the leave camp is exempt from tolls. It must be noticed that the exemption only extends to military *on duty*. It does not, therefore, extend to soldiers *off duty* or to soldiers on leave, or to the wives and children, at any rate when going on foot; but they rarely do go on foot. They nearly always ride in a military vehicle driven by a soldier who is detailed to drive them. The first question is whether in such a case the vehicle itself is exempt from tolls. If the vehicle is exempt the second question is whether the leave men in it are exempt.

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[15] (1694) 3 Levinz 400.

[16] (1838) 8 Ad. & El. 716.

[17] (1865) 6 B. & S. 345.

(i) *Military Vehicles.*

In order to be exempt the vehicles must come within the "transport" named in clause 22. The clause expressly extends, not only to the soldiers themselves but also their "transport." The word "transport" is used as a noun denoting the physical means of conveying persons and things. It refers to the horses, wagons, lorries and vehicles which soldiers use to carry themselves, their equipment, baggage and so forth. But it is to be noticed that it is only "their" transport which is exempt, that is, the transport of military on duty. Do the vehicles in this case come within that description? I think they do. The driver is the person who gives the character to the vehicle. If he is on duty, the vehicle is on duty. For instance, if he is driving a military vehicle containing stores for the leave camp, it is clearly exempt from tolls. So also when he is driving the troops from Mombasa Station to the leave camp or back. Likewise if he is returning empty. The vehicle is, so to speak, on duty, and it is exempt, no matter whether it is carrying baggage, stores or men.

(ii) *The Leave Men in the Vehicles.*

But what about the people in the vehicle? What is the position of the leave men themselves and the wives and children? They are members of the public crossing the bridge and ought, therefore, to pay a toll unless they can point to some exemption; but there is no exemption covering them. They are not "military on duty"; and they cannot shield themselves under the vehicle exemption. If the vehicle had itself paid toll, five men plus the driver would have been covered by the vehicle's toll; but as the vehicle did not pay toll they are not covered by it. The agreement makes it clear that six persons go free in a vehicle when that vehicle has paid toll, but it does not say that they go free when the vehicle has not paid toll. The difficulty is to know what to charge them. The list of charges in clause 22 (*a*) to (*h*) does not cover leave men in military vehicles, or the wives and children who ride in them. They are simply

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not provided for. But there are many other persons and vehicles not provided for by clause 22. Do they all cross free or not?

The position can best be tested by taking some illustrations. Take vehicles over five tons and under 10 tons which the Government permits to cross the bridge for public purposes, such as the lorries of public works contractors carrying road materials, the refuse carts of local authorities, and so forth. Or take vehicles under 1½ tons (not being passenger vehicles nor used for commercial purposes) such as tractors or mowing machines used by local authorities or educational institutions. None of these vehicles is provided for in the agreement. But I do not myself think that such vehicles are entitled to cross the bridge free of charge simply because they cannot be brought within any of the categories (*a*) to (*h*). These vehicles do not come within any of the exemptions. They are simply not provided for. In these circumstances I think that the company are entitled to charge a reasonable amount. The reason is because the agreement is clearly a grant of a right to take tolls from all members of the public who cross the bridge; and it is a settled rule for construing such a grant that, where no particular sum is specified, a reasonable sum is chargeable; and what is reasonable is, in the absence of agreement, to be determined by the court: see *Stamford Corporation* v. *Powlett* [18] and compare *Allnut* v. *Inglis*.[19] Apply this to soldiers on leave and their wives. If they travel in a military vehicle, with a driver on duty, the vehicle itself may be exempt and also the driver, but the men on leave and the wives and children are not exempt. They are members of the public crossing the bridge and the company are entitled to charge a reasonable amount in respect of them. I think, therefore, that a toll should be paid in respect of men on leave and the wives and children who cross the bridge in a vehicle.

IV. *The Army Act.*

Section 143 of the Army Act exempts soldiers on duty from paying tolls when those tolls are demandable by virtue of any Act of Parliament or " by virtue of any Act, Ordinance, order or " direction by any legislature or other authority in a colony "; and " colony " is defined as including a British Protectorate. I doubt whether the Crown can pray in aid this provision, because the toll here is demandable not by reason of an " order " or " direction " of the Government but by the grant of a franchise; but even if the grant of a franchise is regarded as equivalent to a direction, nevertheless the exemption only applies to officers and soldiers "on duty or on the march." It does not exempt men on leave. It also exempts "all carriages and horses belonging "to Her Majesty or employed in her military service when "conveying any such persons . . . or returning from conveying "the same." This exemption seems to have the same scope as the exemption in the agreement. The driver is a soldier on duty and the vehicle is exempt when conveying him; but the leave men in it and the wives and children are not exempt.

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[18] (1830) 1 C. & J. 57, 80.

[19] (1810) 12 East 527, 538.

V. *Conclusion.*

In the result, I think that military vehicles driven by a driver on duty are exempt from tolls, and so are soldiers in the vehicle who are on duty: but men on leave, wives and children must pay a reasonable toll. They would have to pay a toll if they walked across the bridge and I see no reason why they should not pay when they ride across. The Crown will no doubt pay on their behalf, and I hope that some arrangement may be made for a lump sum to cover them, just as it was in the war years.

MORRIS L.J. (read by Parker L.J.). The claim for tolls which is made in this case is not made against a party to the "agreement" of October 9, 1929, but by virtue of the right to claim tolls which is given by such agreement. On behalf of the Crown it is said that the real nature and effect of the agreement was to grant a franchise to take tolls: and that such grant was made by the Crown in the exercise of its prerogative rights in the Protectorate of Kenya. In the submission of the Crown it should have been held that the claim against the Crown failed for the reasons (*a*) that the terms of the "agreement" excluded liability, (*b*) that the Crown, having a prerogative exemption from tolls, was not liable to pay tolls for the use of the bridge, and (*c*) that by an application of section 143 of the Army Act a freedom from liability resulted.

The area of territory which comprises the Kenya Protectorate is under the sovereignty of the Sultan of Zanzibar. It is the fact of such sovereignty which leads to the result that the territory is not Crown territory: but within it the Crown is the protecting power. The circumstance that sovereignty is elsewhere does not prevent the Crown from exercising power in the protectorate. When the Crown, as the protecting power, exercises its power, the prerogatives of the Crown are employed and are brought into play.

In 1895 there was an agreement between Great Britain and Zanzibar respecting the possessions of the Sultan of Zanzibar on the mainland and adjacent islands, exclusive of Zanzibar and Pemba. At earlier dates there had been commercial treaties and from 1890 the territories of the Sultan had been under the protection of the British Crown. In 1897 there was an Order in Council.[20] Article 11 (*a*) begins with the words: "Subject to the "other provisions of this Order, and to any Treaties for the time "being in force relating to the Protectorate, Her Majesty's "criminal and civil jurisdiction in the Protectorate shall . . ." In 1902 there was the East Africa Order in Council.[21] The opening words are: "Whereas the territories of Africa situate "within the limits of this Order are under the protection of His "Majesty the King, and are known as the East Africa Protectorate; And whereas by treaty, grant, usage, sufferance, and "other lawful means, His Majesty has power and jurisdiction "within the said territories: Now, therefore, His Majesty, by "virtue, and in exercise of the powers on this behalf by the "Foreign Jurisdiction Act, 1890, or otherwise, in His Majesty "vested, is pleased, by and with the advice of His Privy Council, "to order, and it is hereby ordered, as follows." The powers which the Crown proceeded to exercise were therefore those which resulted from treaty or from grant or from usage or from sufferance or from other lawful means.

In the Order in Council of 1902 there are no words such as the words "Subject . . . to any treaties for the time being in force "relating to the Protectorate." If, in an Order in Council, there is a reference to a treaty in such manner that it may become necessary to decide whether the terms of the treaty warrant some particular course of action, then the court may have to decide such a question. But, in the ordinary course, it is not for the court to accept an invitation to investigate whether the power and jurisdiction of the Crown results from treaty or from grant or from usage or from sufferance or from other lawful means: nor is it for the court to permit any challenge to the pronouncement of the Crown that it has power and jurisdiction within certain territories.

The preamble of the Foreign Jurisdiction Act, 1890,[22] is in the following terms: "Whereas by treaty, capitulation, grant, "usage, sufferance, and other lawful means, Her Majesty the "Queen has jurisdiction within divers foreign countries, and it is

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[20] East Africa Order in Council, S.R. & O., 1897, No. 575.

[21] S.R. & O., 1902, No. 661.

[22] 53 & 54 Vict. c. 37.

"expedient to consolidate the Acts relating to the exercise of "Her Majesty's jurisdiction out of Her dominions." Section 1 of the Act provides: "It is and shall be lawful for Her Majesty "the Queen to hold, exercise, and enjoy any jurisdiction which "Her Majesty now has or may at any time hereafter have within "a foreign country in the same and as ample a manner as if "Her Majesty had acquired that jurisdiction by the cession or "conquest of territory." The effect of this Act was described in the judgment of the Judicial Committee of the Privy Council in *Sobhuza II* v. *Miller.*[23] Lord Haldane, in delivering the opinion of the Board, said[24]: "The question which at once presents itself "is, what is the meaning of a protectorate? In the general case "of a British Protectorate, although the protected country is "not a British dominion, its foreign relations are under the "exclusive control of the Crown, so that its Government cannot "hold direct communication with any other foreign power, nor a "foreign power with its Government. This is the substance of "the definition given by Sir Henry Jenkyns at p. 165 of his "book on British Rule and Jurisdiction beyond the Seas. Their "Lordships think that it is accurate, and that it carries with it "certain consequences. The protected state becomes only semi-"sovereign, for the protector may have to interfere, at least to a "limited extent, with its administration in order to fulfil the "obligations which international law imposes on him to protect "within it the subjects of foreign powers. A restricted form of "extra-territorial sovereignty may have its exercise called for, "really involving division of sovereignty in the hands of protector "and protected. But beyond this, it may happen that the "protecting power thinks itself called on to interfere to an extent "which may render it difficult to draw the line between a protec-"torate and a possession," and[25]: "The Foreign Jurisdiction "Act thus appears to make the jurisdiction, acquired by the "Crown in a protected country, indistinguishable in legal effect "from what might be acquired by conquest. It is a statute that "appears to be concerned with definitions and secondary conse-"quences rather than with new principles." Having referred to *Rex* v. *Earl of Crewe*[26] and *In re Southern Rhodesia,*[27] Lord Haldane said[28]: "Both of these cases imply that what is done "may be unchallengeable on the footing that the Order in Council,

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[23] [1926] A.C. 518.

[24] Ibid. 522.

[25] [1926] A.C. 518, 525.

[26] [1910] 2 K.B. 576; 26 T.L.R. 439.

[27] [1919] A.C. 211; 34 T.L.R. 595.

[28] [1926] A.C. 518, 525.

" or the proclamation made under it, is an act of State. This " method of peacefully extending British dominion may well be, " as little generally understood as it is, where it can operate, in " law unquestionable."

The Crown therefore exercises its power, which owes its origin to treaty or grant or results from usage or sufferance or other lawful means, just as though the territory had been acquired by conquest or by cession.

Following upon the Order in Council in 1902 there were other Orders in Council, including one in 1911 [29] by which amendments of the Order of 1902 were made. The provisions of articles 15 (1) and (2) of the East Africa Order in Council, 1902, as later amended, are of importance.

In the absence of any evidence suggesting that there are any provisions in the Indian law which was in force in East Africa which affect the present issues, the result appears to be that civil and criminal jurisdiction in the High Court of East Africa is to be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897. There is, however, the proviso that the common law, the doctrines of equity and statutes of general application are to be in force only so far " as the circumstances of the Protectorate and its inhabitants and the limits of " His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances render necessary." The reference to the limits of jurisdiction does not seem to me to be sufficiently explicit to be a reference to the treaty of 1895. If, however, the terms of that treaty are to be looked at, it is clear that the Crown is given power in the matter of tolls.

The powers and prerogatives of the Crown must, I think, be comprehended within the phrase " the substance of the common " law." Further, the common law does not exclude from the powers and prerogatives of the Crown the right to grant a franchise of pontage. In Bacon's Abridgment,[30] in reference to grants arising from the King's prerogative of power and which are inseparably annexed to the Crown, it is said: " So, the King " may grant pontage or murage to be taken by those who erect " new bridges or walls; but the payment thereof shall continue " no longer than the bridge remains useful, or the wall necessary " for the defence of the subject." A consideration of the law which the Crown has ordered to be applicable in the protectorate leads, therefore, to the conclusion that no relinquishment from the plenitude of its power debarred the Crown from granting a franchise to demand tolls and from making a grant in such manner, having regard to local circumstances, as should be appropriate. The necessity of making the grant in any special manner is therefore obviated.

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[29] S.R. & O., 1911, No. 243.

[30] Vol. 6, p. 481.

In 1920 there was the Kenya Protectorate Order in Council.[31] One of its recitals was that it was " expedient to make further " and other provision for the peace, order, and good government " of the territories formerly comprised in the East Africa Pro- " tectorate other than those now included in the Colony of " Kenya." This followed a recital that the Kenya (Annexation) Order in Council, 1920, provided " that the territories comprised " in the East Africa Protectorate save and excepting only such " territories therein included as form part of the Dominions of " His Highness the Sultan of Zanzibar shall, from and after the " coming into operation of the said Order, be annexed to and form " part of His Majesty's Dominions and shall be known as the " Colony of Kenya."

By article 5 of the Kenya Protectorate Order in Council, 1920, the Governor of Kenya Colony was to be Governor of Kenya Protectorate and he was empowered to exercise, on His Majesty's behalf, the powers and jurisdiction of His Majesty in the territories of the protectorate. Article 12 dealt with the jurisdiction of the courts.

The " agreement " of October 9, 1929, was made between the Nyali Bridge and Development Company and " The Govern- " ment of Kenya Colony and Protectorate." The public seal of the colony was affixed. That seal was, by the Order in Council, deemed to be also the public seal of the protectorate.

When the " agreement " was made the effect, in my judgment, was to grant to the company a right to construct and maintain the bridge and to charge tolls for the use of it; the grant was made by the governor in the delegated exercise of the prerogative powers of the Crown, no relinquishment or abandonment of those powers having withdrawn from the Crown that attribute of power which entitled the Crown to grant a franchise of pontage.

By clause 23 of the agreement it is provided that no tolls are to be levied in respect of police or military on duty or their equipment, baggage or transport. The term " military " is one that is in frequent use and that is well understood. If there is occasion for the presence in Kenya Protectorate of military forces of the Crown, it does not seem to me that they would fail to be denoted by the phrase "military on duty" because they were not recruited from Kenya Colony or Kenya Protectorate. I do not accede to the view that the phrase "military on duty" is a reference to the King's African Rifles. It may well be that, in 1929, the contemplation would have been that the only military on duty who would be likely to cross the Nyali Bridge would be the troops of the King's African Rifles. But the agreement did not specify any limitation. In 1912 there was an Ordinance (the King's African Rifles Ordinance [32]) dealing with the establishment of the King's African Rifles. By section 4 it is provided: "There shall be established and maintained in the Colony one or "more battalion or battalions of troops forming part of a regi"ment of His Majesty's forces styled the King's African Rifles, "hereinafter called 'the Regiment.'" By section 5 it is provided: "The Regiment shall be charged with the defence of "Kenya Colony, and of the Kenya, Uganda, Nyasaland and "Somaliland Protectorates, with the maintenance of order and "with such other duties as may be, from time to time, defined "by the Governor or Commissioner of the Colony or Protectorate "within which any portion of the regiment may from time to "time be stationed." Section 8 (1) deals with employment beyond the colony.

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[31] S.R. & O., 1920, No. 2343.

A consideration of this Ordinance reinforces the view which, apart from it, I would have formed that military forces are the forces of the Crown and that it would be inapposite and incorrect to regard the troops of the King's African Rifles as being "servants" of the Government of Kenya Colony and Protectorate.

It was submitted that the words in clause 24 "Tolls payable "by Government or government servants on duty other than as "provided under clause 23" showed that the "police or military "on duty" referred to in clause 23 were government servants, and it was argued that the exclusion must have been of police who were government servants and of military who were government servants and that the latter must have been the King's African Rifles. But sufficient substance is found for the words "other than as provided under clause 23" if they denote, as in my judgment they do, the police in the protectorate.

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[32] East Africa Protectorate Ordinances, No. 15 of 1912, as amended.

It is provided by section 10 of the Police Ordinance[33] that "Superior police officers and inspectors shall from time to time "be appointed in such manner as a Secretary of State may "direct, and in the absence of any special directions on this "behalf they shall be appointed in a similar manner to other "officers in the service of the Colony."

In the exemption from tolls of military on duty there is, therefore, no confinement to the military in the King's African Rifles.

If this view is correct the question arises as to the position when a military vehicle is detailed to convey military personnel. Owing to events in Kenya there are many troops there. A leave camp has been established in Kenya Protectorate near where the bridge from Mombasa joins the mainland. It is recognized by the military authorities that troops at the leave camp will have occasion to go into Mombasa and transport for them is arranged. It happens, therefore, that drivers of military vehicles are ordered to drive to Mombasa and to carry military personnel. There may be occasions when relatives or friends are permitted to accompany such personnel. When a vehicle uses the bridge a toll will be demanded of its driver. If the driver qualifies to be within the words "military on duty" it seems to me to follow that no toll can be exacted either in respect of him or of his vehicle. What, then, is the position if he carries passengers? In all normal circumstances his only passengers would be those whom he is authorized to convey. If the passengers are military on duty—then there is clear exemption from tolls. If the passengers are military who are not on duty or any relatives or friends who are permitted to be with them, then they will be chargeable for tolls to the extent that there is authority to charge. A reference to clause 22 (*d*) shows that a specified charge may be made for each one of the "persons in excess of six in number "travelling in any vehicle." This, I think, is the basis upon which the right to demand tolls from military not on duty should be founded. If military not on duty walk across the bridge a toll of 10 cents per person may be demanded: if military not on duty are conveyed in a military vehicle on an authorized journey driven by a military driver on duty then, for each person in excess of six in number, travelling in the vehicle a toll of 10 cents per person may be demanded. I consider, therefore, that, because of the provisions of the agreement, there was no liability to pay the tolls demanded. No exemption can be claimed or has been claimed in respect of private vehicles used by members of the military forces when on leave or otherwise not on duty.

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[33] Laws of Kenya, 1926, c. 36.

It was further submitted that liability could be resisted because the Crown enjoys a prerogative exemption from the payment of tolls: in support of this submission the decision in *Westover* v. *Perkins*[34] was cited as an illustration of exemption. I do not find it necessary to express an opinion as to how far the immunity of the Crown extends for the reason that I consider that the Crown can, by apt words in a grant, provide for a liability in respect of tolls which might not otherwise arise. Questions often arise as to whether some particular Act of Parliament binds the Crown. No such questions arise here. We were referred to the decision in *Weymouth Corporation* v. *Nugent*[35] where, notwithstanding that in an Act of Parliament certain specific exemptions from wharfage duties were provided for in favour of the Crown, yet a general Crown exemption was upheld. Cockburn C.J. said[36]: "The question here is, whether "the Crown, acting through one of its servants, is liable in "respect of stone brought into the harbour of Weymouth, for "the use of the government works, to the duties imposed by "stat. 6 G. 4, c. cxvi. The doctrine as to the immunity enjoyed "by the Crown from the payment of tolls arose in the times "when tolls were leviable by virtue of a grant from the Crown, "or by prescription from which a grant from the Crown was "presumed; and it may well be assumed that when tolls were "so granted the Crown did not intend to include itself in the "liability to pay them. But whether or not that be the origin of "the immunity, it has obtained from the earliest times, and "we cannot suppose that the legislature took upon itself to make "the Crown liable to the payment of these duties without "mentioning the Crown in the statute. Even supposing that "those who represent the Crown could not succeed upon the first "principle, I think the second concludes the case. The rule that "the Crown is not bound by an Act of Parliament unless "specially named in it, applies in such a case as the present, "where tolls and duties are taken under a local Act; so that this "is not within the exceptional cases in which the Crown, though "not named, is bound. Mr. Lush relies on section 23, which "contains exemptions in favour of the Crown, and he insists "upon the doctrine that the expression in a statute of certain "exemptions leads to the inference that it was intended by the

[34] (1859) 2 E. & E. 57.

[35] (1865) 6 B. & S. 22.

[36] Ibid. 34.

"legislature that there should be no others. But the case falls "within the principle laid down in Bacon's Abridgment Prerogative (E), 5, referred to in the argument, and we must "suppose that the exemptions were inserted ex majori cautela, "with the view of pointing out to those charged with the collection of the duties the cases most likely to arise, in which they "were to abstain from demanding them. I am fortified in this "opinion by the judgment of Lord Campbell in *Westover* v. "*Perkins*."[37] But in the present case the Crown has by its grant provided for certain exemptions from and certain liabilities for tolls and has done so by arrangements which seem to me to be comprehensive and to exclude immunity beyond the extent prescribed.

By the Army Act, 1881, as amended by subsequent Acts, certain exemptions from tolls are given which apply in a protectorate. All officers and soldiers of the regular forces on duty or on the march and all carriages (meaning vehicles for carriage or haulage other than those specially constructed for use on rails) belonging to Her Majesty or employed in Her military service when conveying any such persons or returning from conveying them are exempted from payment of any tolls, in passing over any bridge, otherwise demandable by virtue of any Act, Ordinance, order or direction of any legislature or other authority in a protectorate. (See section 143 of the Army Act, 1881, as amended.) The tolls in the present case do not seem to be "demandable "by virtue of any Act, Ordinance, order or direction of any "legislature or other authority" in the Kenya Protectorate. If they were, then any statutory exemption would only apply to officers and soldiers of the regular forces "on duty or on the "march." Officers and soldiers on leave would not, therefore, qualify for exemption even if the statutory provision had applied.

For the reasons which I have given I consider, therefore, that the appeal succeeds. It seems manifest that recent events in Kenya have caused a very different state of affairs from that contemplated in the year 1929. At all times, both during the period when sums of money were, by agreement, paid for the use by the military of the bridge and since that period, the expenses of the maintenance of the bridge have had to be undertaken by the plaintiffs. It may be that increased user necessitates additional burdens of maintenance. The only duty of the court is to decide as to the legal position: but the proceedings may serve to clarify certain considerations which would seem to be important if discussions take place as to granting a new basis of demanding tolls.

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[37] 2 E. & E. 57.

Parker L.J. Interesting and important questions as to the exercise of the prerogative in a protectorate and as to the application therein of the Army Act have been debated in this appeal, but there is one short point which, in my opinion, is decisive in the Crown's favour—namely, that on its true construction the word "military" in the phrase "military on duty or their "equipment baggage or transport" in clause 23 of the agreement of October 9, 1929, includes all soldiers of the Queen.

[His Lordship stated the facts, referred to the relevant clauses of the agreement of October 9, 1929, and continued:] Speaking for myself, I cannot construe "military" in clause 23 as meaning anything less than the soldiers of the Queen. Save that the privates, non-commissioned officers and native officers of the King's African Rifles are recruited locally in East Africa, are paid by the Government of Kenya Colony, and that the regiment is charged primarily with the defence of Kenya Colony and the Protectorate, I can see nothing to distinguish them from other soldiers of the Queen. The regiment's officers, other than native officers, are appointed by the Secretary of State and all ranks take on enlistment the usual declaration of allegiance to Her Majesty.

In treating "military" as confined to the King's African Rifles the trial judge was, I think, largely influenced by the wording of clause 24, which provided that government servants on duty other than as provided under clause 23 should only pay 75 per cent. of the tolls prescribed by clause 22. This, so the argument runs, shows that the military in clause 23 were being treated as servants of the Government of Kenya Colony and Protectorate and no military other than the King's African Rifles could be described, however inaptly, as servants of that government as opposed to servants of the Queen. The fallacy of this argument, as it seems to me, is that clause 23 also exempts police which in Kenya Colony and Protectorate are servants of that government and, accordingly, the expression in clause 24, "other than as "provided under clause 23," was necessary. The argument, based on clause 24, could, as it seems to me, only be valid if it were possible to read clause 23 as itself a proviso to clause 24. To do so, however, would be to rewrite the clauses and not to ascertain the intention of the parties from the language used.

The matter does not end there, however, since the main traffic over the bridge now consists of military vehicles in charge of a military driver, himself on duty, carrying soldiers on leave or the families and friends of soldiers at the camp. Such passengers are not persons who have "thumbed" a lift, but persons for whom the military authorities choose to provide transport. Sometimes no one but the driver is on duty, sometimes some of those carried are also on duty.

The Crown contends: (1) that where a military vehicle has been detailed by the military authorities to cross the bridge in charge of a military driver on duty neither the driver nor the vehicle is chargeable; and (2) that by reason of paragraphs (*a*) and (*d*) of clause 22 the first six persons (including the driver) are exempt from tolls whether they are on duty or not and that only any excess over six, if not on duty, are chargeable.

With regard to the first contention, I agree with Hilbery J., who said: "I think that the right way to read it here is that it "is an exemption, as it says, of military on duty or that which "is going with the military on duty, the transport, and that the "transport in such a case is going with a driver on military duty, "and I think in those circumstances it would be exempt." When one or more (apart from the driver) of those carried are on duty, then the vehicle is clearly "their transport" notwithstanding that others in the vehicle may be on leave. Further, where the only person on duty is the driver, I should have thought that the vehicle was transporting him notwithstanding that he was the driver and that, accordingly, the vehicle could properly be described as his transport. In this connexion it is to be observed that under the somewhat similar words of section 143 of the Army Act, it has been assumed that an officer's private car, which he was authorized to use for journeys on duty, was exempt from tolls though carrying no one but the officer who was the driver (cf. the first of the two cases dealt with in *Attorney-General* v. *Company of Proprietors of Selby Bridge* [38]). This was so despite the fact that on the particular wording of that section, which dealt specifically not only with vehicles carrying soldiers on duty but vehicles returning from carrying the same, it was arguable that the driver was not a person conveyed.

With regard to the second contention, it would be an odd result that military not on duty should not be chargeable if carried in a military vehicle, but chargeable if they were on foot.

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[38] [1921] 1 K.B. 149; 36 T.L.R. 848.

Yet, where is the power to charge such a person if he is one of six passengers in the vehicle? It would have been possible to provide that such a person should be chargeable, but nowhere are there to be found words apt to charge him. He is, indeed, a casus omissus, and one can think of others in going through clause 22. It was suggested that there was power nevertheless to lay down fresh classes of person liable to tolls, but, in my opinion, clause 12 affords a conclusive answer to the existence of such a power. Clause 12 provides that the bridge is to be kept open to all traffic subject only to the payment of the tolls actually prescribed in the agreement. It seems to me, therefore, that the Crown is right also in this contention.

That is sufficient to decide this case, but since the other points have been fully argued and have been dealt with by the trial judge, it is only right that I should express my views shortly upon them.

(1) *The Prerogative.*

The Crown contend that the permission to charge tolls given by the agreement was given in the exercise of the prerogative right to grant a franchise of pontage and that, whatever the agreement says, all Crown servants are exempt from paying such tolls. So far as this country is concerned, it is clear that no man can lawfully charge a toll unless authorized so to do by Act of Parliament or by a grant of franchise from the Crown, and such a grant to be valid must be by Royal Charter or by Letters Patent under the Great Seal. It is said, however, that the prerogative does not run in Kenya Protectorate, first, because the sovereignty of the territory is still in the Sultan of Zanzibar and, secondly, because, in any event, the local law does not incorporate the common law in so far as such prerogative rights are concerned.

The position in the protectorate is, shortly, as follows: The territory in question, together with the other dominions of the Sultan, became, in 1890, a protectorate. By an agreement made in 1895 the administration of the territory was handed over by the Sultan to officers appointed by the British Government who were to be responsible solely to that government. They were to have full power in regard, in particular, to the executive and judicial administration and the levy of taxes, duties and tolls, and were to have control over roads, waterways and other means of communication. The agreement, however, expressly provided that the sovereignty of the territory was to remain in the Sultan.

Pausing there, it seems to me that at that point of time Her

Majesty's prerogative powers in regard to this territory cannot be described as a residue of powers legally left in the hands of the Crown (cf. Dicey's definition), but are, in truth, the plenitude of the sovereign's powers in regard to the matters handed over to her by the agreement. It is by virtue of this plenitude of powers that Her Majesty can, thereafter, set up legislative and executive authority for the territory and can lay down the law to be applied therein. Unless and until her powers are curtailed by the constitution set up for the territory or by the law made applicable therein, Her Majesty governs by virtue of the prerogative. In truth and in fact the sovereignty remaining in the Sultan is but a residue of sovereignty. But even if I am wrong in this it is, I think, clear that these courts will not consider the limits of the jurisdiction granted by treaty or otherwise to Her Majesty. Such limits may be extended by sufferance and usage and the courts will and must assume that the legislative or other acts in question are within the jurisdiction granted. All that they can do is to look at the instrument manifesting the exercise of the jurisdiction to see whether it has been lawfully exercised, according to the law in force. (Cf. *Sobhuza II* v. *Miller*.[39])

I turn, therefore, to the relevant legislation in force in 1929. By clause 5 of the Kenya Protectorate Order in Council, 1920,[40] the Governor of Kenya Colony was authorized, empowered and commanded to exercise, on His Majesty's behalf, all such powers and jurisdiction as His Majesty, before or after the passing of the Order, had or may have in the territories and to that end to do or cause to be taken all such measures, and to do or cause to be done all such matters and things therein as are lawful. It is clear, therefore, that, if the local law has not curtailed the prerogative power to grant a franchise of pontage, the governor had the power to make such a grant.

By clause 15 of the East Africa Order in Council, 1902, as amended in 1911,[41] it was provided that civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Indian law in force in East Africa, and subject thereto, "in conformity with the substance of the "common law the doctrines of equity and the statutes of general "application in force in England on August 12, 1897." To this there was a proviso in these terms: "Provided always that the "said common law doctrines of equity and statutes of general "application shall be in force in the Protectorate so far only as

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[39] [1926] A.C. 578.

[40] S.R. & O., 1920, No. 2343.

[41] S.R. & O., 1902, No. 661, and S.R. & O., 1911, No. 243.

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"the circumstances of the Protectorate and its inhabitants and "the limits of His Majesty's jurisdiction permit, and subject to "such qualifications as local circumstances render necessary." I should have thought that it was quite impossible to suggest that the prerogatives of the Crown were not within the substance of the common law. Nor, in my view, can it be said that the proviso cuts down or ousts the right to grant a franchise of pontage. Indeed, by applying the common law "subject to such qualifica- "tions as local circumstances render necessary" the necessity for the grant being made by matter of record is obviated, and it is sufficient if the grant is made under the public seal. Nor do I think that the words "and the limits of His Majesty's jurisdiction "permit" are intended to open the door to an investigation of the jurisdiction acquired by treaty, usage or sufferance, but in any event, as I have already said, the agreement of 1895 gives ample power.

In my opinion, therefore, the permission to charge tolls given to Nyali Ld. by the agreement of 1929 amounted to a prerogative grant of a franchise of pontage and the question of Crown exemption then arises. As I understand it, the Crown is exempt from payment of tolls thorough, but is not exempt from payment of tolls traverse, and this whether the tolls are in respect of highways, bridges or ferries. In *Hammerton* v. *Dysart*[42] Lord Parker said[43]: "Tolls are generally classified as tolls traverse "and tolls thorough. If, apart from the franchise, no one would "have had a right to do that for which the toll is charged, the toll "is a toll traverse. If, apart from the franchise, anyone would "have had the right to do that for which the toll is charged, the "toll is a toll thorough. In the former case the consideration "moving to the public may be found in the right conferred on the "public by the franchise. For example, if before the creation of "the franchise the road for the use of which toll is charged was a "private road, the consideration may be the dedication of the "road to the public. In the latter case the consideration moving "to the public cannot be the dedication of the road, for the road "was ex hypothesi at the time of the creation of the franchise "already a public road. It must be found elsewhere, for example, "in an obligation to keep the road in repair." Applying this test, I should have thought that the tolls in the present case were tolls traverse and, accordingly, that there was no Crown exemption except, of course, in so far as it is expressly provided for in the grant. But quite apart from this I am not satisfied that the principle in *Weymouth Corporation* v. *Nugent*[44] applies in the circumstances of the present case.

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[42] [1916] 1 A.C. 57.

[43] Ibid. 78.

(2) *The Army Act, section* 143.

This provision since 1932 is applicable in a protectorate: see the definition of " colony " and " court of summary jurisdiction " in section 190. Accordingly, it runs in the protectorate, and the only question is whether the tolls demandable by virtue of the agreement of 1929 are " demandable by virtue of any Act, " Ordinance, order or direction of any legislature or other " authority." In my opinion these words are not wide enough to embrace the agreement. The words " order or direction of any " . . . other authority " contemplate delegated legislation. Indeed, it is to be observed that, so far as this country is concerned, the exemption does not apply unless the tolls are demandable by virtue of an Act of Parliament. In my opinion, the exemption was not intended to apply anywhere to tolls demandable by virtue of a Royal grant of franchise. However, therefore, the matter is approached, this case, as it seems to me, falls to be determined on a true construction of clause 23 of the agreement of 1929 which I dealt with at the outset. I would only add this: this agreement falls to be applied in circumstances quite different from those which the parties could have envisaged in 1929. I have in mind in particular the presence of this leave camp. Once, however, the legal position has been ascertained, I have no doubt that the Crown will be prepared to negotiate an agreement to meet these altered circumstances. I would allow this appeal.

*Appeal allowed.*

Solicitors: *Travers Smith, Braithwaite & Co.; Treasury Solicitor.*

E. J.

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[44] 6 B. & S. 22.

1955
*Oct.* 11, 18.

Lord Goddard C.J., Ormerod and Glyn-Jones JJ.

# REGINA *v.* GRIMSBY BOROUGH QUARTER SESSIONS. *Ex parte* FULLER.

*Crown Practice — Certiorari — Prejudice or bias — Quarter sessions — Appeal to quarter sessions against summary conviction—Attention of recorder drawn to passage in police report—Passage in report followed by list of previous convictions—Real likelihood of prejudice—Vagrancy Act,* 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

*Justices—Appeal to quarter sessions—Practice—Documents to be placed before the court. Justices—Bias or prejudice.*

The applicant appealed to quarter sessions against a summary conviction on a charge of being found in enclosed premises for an unlawful purpose contrary to section 4 of the Vagrancy Act, 1824. During the course of the hearing at quarter sessions and before the recorder had come to his decision the clerk of the peace, acting in the interests of the applicant, handed a police report to the recorder and drew his attention to a certain passage. The recorder marked the passage and kept the report beside him during the rest of the hearing. The next line in the report, immediately below the passage to which the recorder's attention was drawn, stated that the applicant "has been previously convicted as follows": and there was set out a list of previous convictions. The recorder dismissed the appeal and the applicant, who had not put his character in issue, moved for an order of certiorari to bring up and quash the determination of the recorder:—

*Held* that, although certiorari would not be granted for every irregularity in the course of a hearing in petty or quarter sessions, where an order of certiorari was sought on the ground of prejudice, the court would apply the same test as in a case where bias on the part of an adjudicating justice was alleged and would grant the order where there was a real likelihood of prejudice: therefore, since it was impossible, in view of the nature of the document handed to him, to assume that the recorder had not become aware before he gave his decision that the applicant was a man with previous convictions, and since in a case like the present, where the essence of the charge was the purpose for which the accused was in enclosed premises, information as to previous bad character was highly prejudicial, an order of certiorari must be granted.

*Regina* v. *Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; [1954] 2 All E.R. 850, and dictum of Lord O'Brien L.C.J. in *Rex* v. *Queen's County Justices* [1908] 2 I.R. 285, 294, applied.

*Per curiam.* Where there is an appeal against summary conviction no documents should be placed before the court except the conviction, the notice of appeal and copies of exhibits if they are going to be proved and no objection has been taken to their admissibility, and care must be taken to see that the police report is not given to the court until the decision is announced. The safe rule to apply is that nothing should be placed before the appeal committee or the recorder which could not be given to a jury.

APPLICATION for an order of certiorari.

The applicant, George Arthur Fuller, appealed to Grimsby Borough Quarter Sessions against his conviction by Grimsby justices of being found in enclosed premises for an unlawful purpose contrary to section 4 of the Vagrancy Act, 1824. At the hearing at quarter sessions the applicant did not put his character in issue and his defence was that he was on the premises in question for the purpose of seeking work. In cross-examination he was asked why he had not accepted work which had been offered to him shortly before he appeared before the justices, when the clerk of the peace, knowing that a report prepared by the police as to the applicant's antecedents and previous convictions contained a passage to the effect that the applicant had been in custody before he had appeared before the justices so that he could not have accepted the work offered, intervened in the interests of the applicant and handed the report to the recorder, calling his attention to the passage in question. The recorder marked the passage and put the report on one side, keeping it by him during the rest of the hearing. The next line in the report after the passage to which the recorder's attention had been drawn read: "Fuller has previously been convicted as "follows": and on the same page there were set out particulars of 11 previous convictions.

At the conclusion of the hearing the recorder announced that he would confirm the conviction and asked for evidence as to the character of the applicant.

During the hearing a police officer gave evidence as to a statement made to him by the applicant and, in order that he might more easily follow the statement, a bundle of proofs of evidence of the witnesses for the prosecution was handed to the recorder.

The applicant applied for an order of certiorari to quash the decision of the recorder dismissing his appeal on the grounds (a) that the recorder, when hearing the appeal, had before him a document setting out the applicant's antecedents and previous convictions when he had not put his character in issue, and that the document had been placed before the recorder without the knowledge or approval of his counsel and without any form of proof; and (b) that the recorder was supplied with copies of the proofs of witnesses called on behalf of the prosecution.

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The facts are more fully stated in the judgment of the court.

*J. Malcolm Milne* for the applicant. The hearing of an appeal by quarter sessions is a rehearing which should be conducted in precisely the same way as the hearing before the justices; since the Criminal Justice Act, 1948, justices have no power to inquire into previous convictions until after they have decided to convict, except in cases where the right to be tried by a jury depends on proof of a previous conviction, as to which see rule 23 of the Magistrates' Courts Rules, 1952.

In all types of case it is most undesirable that previous convictions should be before the court before conviction, and that is especially true where there is a charge of this nature.

The most recent authority in which the cases are reviewed is *Reg.* v. *Camborne Justices, Ex parte Pearce.*[1] Reliance is placed upon the remarks of Avory J. in *Rex* v. *Hertfordshire Justices.*[2] That case was followed by a line of authority in respect of irregularity in proceedings before justices. [Reference was made to *Rex* v. *Sussex Justices, Ex parte McCarthy*[3] and *Rex* v. *Essex Justices, Ex parte Perkins.*[4]] In *Rex* v. *Bodmin Justices, Ex parte McEwen*[5] a witness went into the justices' private room and, although nothing improper was said, an order of certiorari was issued. In *Reg.* v. *East Kerrier Justices, Ex parte Mundy,*[6] where the justices' clerk took a note of the defendant's previous convictions into the justices' room after the justices had decided to convict but before they had announced it, certiorari again issued. [Reference was also made to *Reg.* v. *Welshpool Justices, Ex parte Holley*[7] and *Reg.* v. *Barry (Glamorgan) Justices, Ex parte Kashin.*[8]]

On the question of the discretion of this court to grant relief in proceedings for certiorari, see *Reg.* v. *Surrey Justices*[9] and *Rex* v. *Stafford Justices, Ex parte Stafford Corporation.*[10] In this case there is ground on which the court can exercise its discretion to grant an order of certiorari.

It is undesirable that the clerk of the peace should have proofs of evidence or notes taken in the court below; the handing of the proofs of evidence to the recorder was an irregularity which is also relied upon.

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[1] [1955] 1 Q.B. 41; [1954] 2 All E.R. 850.

[2] [1911] 1 K.B. 612, 624; 27 T.L.R. 156.

[3] [1924] 1 K.B. 256.

[4] [1927] 2 K.B. 475; 43 T.L.R. 415.

[5] [1947] K.B. 321; [1947] 1 All E.R. 109.

[6] [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144.

[7] [1953] 2 Q.B. 403; [1953] 2 All E.R. 807.

[8] [1953] 1 W.L.R. 1320; [1953] 2 All E.R. 1005.

[9] (1870) L.R. 5 Q.B. 466.

[10] [1940] 2 K.B. 33; 56 T.L.R. 623.

*T. R. Fitzwalter Butler* for the clerk of the peace and the chief constable. It is conceded that a defendant's antecedents should not be put before justices before conviction, and that to do so is an irregularity, but quarter sessions are in a different position, for usually there is a legally qualified chairman, so that if an irregularity of this kind does occur the damage is likely to be much less.

A hearing is not necessarily vitiated by an irregularity of this kind. Each case must depend upon whether what was disclosed goes to the root of the matter. The document was put before the recorder to prevent prejudice to the applicant; after the recorder's attention had been drawn to the passage in question he immediately put the document aside, and, although the position might have been very different in other circumstances, no real injustice was done.

While a defendant's antecedents should not be before the court before conviction, if the information is of so limited a nature as in the present case this court has a discretion whether or not to grant an order of certiorari, because it does not manifestly appear that any injustice has been done. [Reference was made to *Rex* v. *Stafford Justices, Ex parte Stafford Corporation.*[11]] It is not established that the recorder knew of the applicant's previous convictions for this type of offence, and, therefore, no real likelihood of injustice has been shown.

Lord Goddard C.J. An order of certiorari will issue and the court will put its reasons for the decision into writing and give them at a later date.

October 18. Lord Goddard C.J. read the following judgment of the court: In this matter Mr. Milne moved for an order of certiorari to bring up and quash an order of the quarter sessions for the borough of Grimsby dismissing an appeal by one Fuller against his conviction by the borough justices for being found in an enclosed place for an unlawful purpose contrary to section 4 of the Vagrancy Act, 1824, for which offence he was sentenced to three months' imprisonment. Shortly stated, the grounds of the motion were, firstly, that the recorder was given a document in which the previous convictions of the applicant, and there were a great many, were set out, although he had not put his character in issue, and, secondly, that the recorder was supplied with proofs of the evidence of the witnesses for the prosecution.

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[11] [1940] 2 K.B. 33.

The material facts appear from the affidavit filed in support of the motion and one filed by the clerk of the peace which, so far as it relates to matters of which he can speak of his own knowledge, Mr. Milne accepts as accurate. It seems that the applicant set up the familiar defence in this class of case that he was on the premises in question for the purpose of seeking work. In cross-examination he was asked why he had not accepted work which had been offered to him shortly before he appeared before the justices. Now the police had quite properly prepared a report as to the prisoner's antecedents and previous convictions to put before the recorder if the appeal was dismissed, and had given it or a copy to the clerk of the peace. The report contained this passage: "In respect of the present offence, Fuller was "summoned to appear before the Grimsby Borough Magistrates' "Court. He failed to appear and was arrested on a magistrates' "warrant."

The clerk of the peace, knowing of this passage, intervened in the interests of the applicant, as had he been in custody under the warrant he could not have accepted the work offered nor probably would any have been offered to him. The clerk accordingly handed the police report to the recorder, calling his attention to this passage. The latter thereupon marked the passage in question and kept the report by him during the rest of the hearing. Incidentally, though it has no bearing on the result, it was proved that the passage in question was a mistake, for the applicant had appeared on the summons. This was elucidated by the recorder and consequently the cross-examination was in fact pertinent. The unfortunate thing is that the very next line after the passage to which I have referred reads: "Fuller has previously been convicted as follows," and then are set out 14 previous convictions, 11 of which are on the same page of the report as the passage I have quoted. The clerk says in his affidavit that the recorder did not peruse the report except the passage relating to the applicant's appearance before the justices. Though no doubt this is what he believes, he cannot possibly prove what the recorder read or did not read, and as we have said, not only did the latter mark the passage in question, but he kept the report by him, and whether he looked at it before announcing his decision the clerk cannot know. Somewhat to the surprise and regret of this court the recorder has not thought fit to file an affidavit, and in the absence of any affidavit we find it impossible to believe that he did not become aware that the applicant had previous convictions, although very likely he did not scrutinize the list, and may well not have known how many there were. But having seen the actual document we cannot, at least in the absence of any explanation by the recorder, come to any conclusion other than that the mere sight of the document would show that the applicant was a man with a long list of convictions.

However improbable or unattractive a defence may be, the accused is entitled to have it considered impartially and to be tried in accordance with well-established rules. With a few statutory exceptions, unless the accused puts his character in issue his convictions must not be made known to the tribunal which has to decide his guilt or innocence as a matter of fact, but when, as in this case, the essence of the charge is the purpose for which the accused was on the enclosed premises it is obvious that information as to his previous bad character is not only highly prejudicial, but probably fatal. The merest glance at this report by anyone accustomed to this class of document, as every recorder would be, would show him that he was dealing with what I may be permitted to call an old hand.

What, then, should this court do in the circumstances? It is not for every irregularity in the course of a hearing either in petty or quarter sessions that a certiorari would be granted. In our opinion we ought to apply the same rule as in a case where bias on the part of a justice adjudicating is alleged, which was fully considered by this court in the recent case of *Reg.* v. *Camborne Justices, Ex parte Pearce*,[1] where in the result a certiorari was refused. It was there held that there must be a real likelihood of bias and so here we would say a real likelihood of prejudice. We emphasize it is likelihood, not certainty. We applied the judgment of Blackburn J. in *Reg.* v. *Rand*,[2] and also adopted the words of Lord O'Brien L.C.J. in *Rex* v. *Queen's County Justices*[3]: "By 'bias' I understand a real likelihood "of an operative prejudice, whether conscious or unconscious," and this, in our opinion, amply justifies us in applying the same test in the present case as would be applied where a motion is brought on the ground of bias. In *Rex* v. *Hertfordshire*

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[1] [1955] 1 Q.B. 41.

[2] (1866) L.R. 1 Q.B. 230, 231.

[3] [1908] 2 I.R. 285, 294.

*Justices* [4] Avory J. said [5]: "It would obviously be most improper "for the justices to inquire into the character and antecedents "of the person charged until, after having heard all the evidence, "they have determined to convict him; if they did so, and then "proceeded to convict, the defendant could come to this court "and get the conviction quashed on the ground that the justices "had wrongly admitted evidence as to character before conviction." It is true that in this case it was not until he had announced that he would dismiss the appeal against conviction that the recorder asked for evidence as to character, but for the reasons already given we cannot in the absence of any explanation by the recorder assume that he did not become aware before he gave his decision that there were previous convictions.

This is enough to oblige the court to grant the order of certiorari, but as the matter was raised we will say a word about the second ground put forward, namely, that the recorder was supplied with the proofs of the witnesses. What happened was that the applicant had made a statement to the police constable in the case and the bundle of proofs was handed to the recorder that he might more easily follow the statement which was therein recorded. While the more correct course would have been to hand up merely a copy of the statement or only that part of the proof which set it out, we should not and do not grant the certiorari on that ground, for it shows no real likelihood of prejudice.

I desire to add that the court recognizes that, in handing the report to the recorder and calling his attention to the passage to which we have referred, the clerk of the peace was acting in the interests of the prisoner, and we do not suggest that the recorder was consciously prejudiced thereby. It was just unfortunate that the form of the report was what it was, so that the previous convictions must have come to the eye of the recorder who kept it beside him.

This case, however, does enable the court to remind quarter sessions that, where there is an appeal against conviction, no documents should be placed before the court except the conviction, the notice of appeal and copies of exhibits if they are going to be proved and no objection has been taken as to their admissibility. We emphasize this matter because from inquiries that we have made it appears that there is by no means uniformity among quarter sessions in this respect. We have learnt that at some courts it is the usual practice to supply a copy of the notes taken by the clerk to the justices. This is objectionable, though it may be that in the course of the case it may be necessary to refer to them. This must depend upon the course the trial takes. Care must be taken to see that the police report is not given to the court until the decision is announced. The safe rule to apply is that on an appeal against a summary conviction nothing should be placed before the appeal committee or the recorder which could not be given to a jury.

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[4] [1911] 1 K.B. 612; 27 T.L.R. 156.

[5] [1911] 1 K.B. 612, 624.

*Order of certiorari.*

Solicitors: *J. H. Milner & Son for James Young, Great Grimsby; Hyde, Mahon & Co. for L. W. Heeler, Great Grimsby; Godfrey Warr & Co. for John Barker, Grimsby.*

J. F. L.

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## J. MILLER LD. *v.* BATTERSEA BOROUGH COUNCIL.

1955
*Oct.* 14.

Lord Goddard C.J., Ormerod and Glyn-Jones JJ.

*Food and Drugs—Food—Unfit for human consumption—Sale of bun containing piece of metal—Prosecution for sale of food "unfit for "human consumption"—Charge not applicable—Food and Drugs Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 3, 9 (1).

A chocolate cream bun bought from the appellants' shop was found to contain a small piece of metal which a child, while eating the bun, got into his mouth. The appellants were prosecuted under section 9 of the Food and Drugs Act, 1938, for selling food which was "unfit for human consumption":—

*Held*, that section 9 of the Act applied to food which was unsound in the sense that it was putrid or unwholesome, and, therefore, although the presence of the piece of metal might give grounds for complaint under section 3, it did not render the bun unfit for human consumption within the meaning of section 9.

CASE STATED by a stipendiary magistrate sitting at South Western Magistrates' Court.

On February 18, 1955, an information was preferred on behalf of the respondents, Battersea Borough Council, against the appellants, J. Miller Ld., that they on January 14, 1955, at 48, Northcote Road, Battersea, S.W.11, did by their servant or agent sell to a Mrs. A. E. Eastman a certain article of food, to wit, a chocolate cream filled cake, intended for, but unfit for, human consumption in that it contained a piece of metal, contrary to

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section 9 of the Food and Drugs Act, 1938.[1] The magistrate heard the information on March 17 and found the following facts. On January 14, 1955, Mrs. Eastman bought at the appellants' shop four chocolate cream buns, being served by a servant of the appellants. The buns, when sold, were intended for human consumption. One of the buns contained at the time it was sold a piece of metal. The same day Mrs. Eastman's son began to eat the bun and got the piece of metal into his mouth.

It was contended by the appellants (a) that there was no evidence that the bun was unfit for human consumption, the bun itself being perfectly sound and uncontaminated, notwithstanding that it contained a small piece of metal; (b) that section 9 of the Food and Drugs Act, 1938, was clearly intended to apply only to unsound food and must be read in conjunction with section 10 of the Act, which applied to the examination and seizure of unsound food; (c) that section 3 of the Act created an offence in the sale of food which was not of the quality of food demanded by the purchaser by reason, inter alia, of additional extraneous matter, and was the appropriate section of the Act for proceedings in the present case; (d) that if the proceedings had been brought under section 3 of the Act, a number of defences would have been open to the appellants by virtue of section 4, and that by bringing the proceedings under section 9 the respondents had deprived the appellants of the opportunity of raising any of those defences; (e) that the maximum penalty for an offence under section 9, namely, that fixed by section 9 (4), was greater than that for a first offence under section 3, and that proceedings under the wrong section of the Act should not render the appellants liable to a more severe penalty than could be imposed on a conviction under the appropriate section.

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[1] Food and Drugs Act, 1938, s. 3: "If a person sells to the prejudice "of the purchaser any food or drug "which is not of the nature, or not of "the substance, or not of the quality, "of the food or drug demanded by "the purchaser, he shall, subject to "the provisions of the next succeeding "section, be guilty of an offence."

S. 4: "In proceedings under the "last preceding section it shall be a "defence for the defendant to prove— ". . . (4) where the food . . . in "question contains some extraneous "matter, that the presence of that "matter was an unavoidable consequence of the process of collection "or preparation."

S. 9: "(1) A person who—(a) sells, "or offers or exposes for sale, or has "in his possession for the purpose of "sale or of preparation for sale . . . "any food intended for, but unfit for, "human consumption shall, subject "to the provisions of this section, be "guilty of an offence. . . . (4) A "person guilty of an offence under "this section shall be liable to a fine "not exceeding fifty pounds, or to "imprisonment for a term not exceeding three months, or to both such "a fine and such imprisonment."

The respondents contended that the article sold, namely, a bun containing a piece of metal, was, as a whole, unfit for human consumption.

The magistrate was of opinion that by reason of the presence therein of the piece of metal the bun, as a whole, was unfit for human consumption at the time it was sold, and that as it was intended for human consumption the proceedings were properly brought under section 9. He accordingly convicted the appellants, imposed a fine of £10, and ordered them to pay £3 3s. costs to the respondents.

The question for the opinion of the court was whether, upon the facts stated, the magistrate came to a correct determination in point of law.

*James Burge* for the appellants. The words "unfit for "human consumption" in section 9 of the Food and Drugs Act, 1938, apply to food that is contaminated, diseased or in a state of putrefaction. The bun in this case could not be said to be unfit for human consumption. If a Christmas pudding is sold with a threepenny piece in it, the pudding is not unfit for human consumption, although no one would eat the threepenny piece. This case comes within section 3 of the Act, which makes the sale of food not of the quality demanded by the purchaser an offence; section 4 (4) shows that food containing additional extraneous matter is within the contemplation of section 3. The penalties imposed for an offence under section 9 are much heavier than those under section 3, and a prosecution should not be brought under a section carrying a sentence of imprisonment and a higher fine when the facts equally well bring the offence within a section carrying lesser penalties.

*Paul Wrightson* for the respondents. Whether or not a Christmas pudding with a threepenny piece in it is unfit for human consumption within the meaning of section 9 depends upon the circumstances; if the pudding was bought in a shop the purchaser might not expect to find a threepenny piece in it, or, if there was, might expect to be warned, whereas it might be expected in a pudding made at home. Inspectors dealing with these matters experience difficulties in electing under which section a prosecution should be brought; but it is submitted that here the bun was unfit for human consumption, and that proceedings were rightly brought under section 9.

[LORD GODDARD C.J. Pheasants are often found to have shot in them, but that does not mean that they are unfit for human consumption.]

If the shot affects the fleshy part of the bird and has to be cut out before it can be eaten, then it is submitted that the pheasant would be unfit for human consumption. [Reference was made to *Lindley* v. *George W. Horner & Co. Ld.*[2]]

There are numerous examples in the statutes of sets of sections which have the same effect and which are not mutually exclusive. If a charge is brought under section 3 of this Act a defendant might well submit that it should have been brought under section 9.

Lord Goddard C.J. stated the facts and continued: The Food and Drugs Act, 1938, is divided into certain parts. Part I deals with general provisions as to food and drugs and in section 3 there is a prohibition against sale of any food or drug not of the nature, substance or quality demanded by the purchaser. Under section 4, among other things that may make the food not of the nature, substance or quality demanded, is the presence of a foreign body, or something of that nature. Section 4 provides that in proceedings under section 3 it shall be a defence for the defendant to prove: "(4) where the food or drug in question contains some "extraneous matter, that the presence of that matter was an "unavoidable consequence of the process of collection or pre-"paration." Obviously, therefore, the legislature is considering that an offence under section 3 may be established by showing that there is extraneous matter present. An offence is committed unless the presence of that extraneous matter was an unavoidable consequence of the process of collection or preparation. Of course, if one finds a piece of metal in an article sold for food, that is extraneous matter which ought not to be there. That happened in *Lindley* v. *George W. Horner & Co. Ld.*,[1] where some sweets contained a nail. But sections 9 to 12 of the Act are concerned with what the statute calls "unsound food." How can it be said that food becomes unsound, that is to say, putrid or dangerous to health, merely because there is a piece of extraneous matter in it which has no effect upon the general composition of the food? Two illustrations have been given in the present case which seem to me to make the point perfectly clear, indeed unanswerable. A person who buys game finds some metal pellets in it. The fact that the game has shot in it does not make it unfit for human consumption, although everyone who has eaten game knows that it is sometimes quite painful if one bites on the shot. That is probably not to the prejudice of the purchaser because one expects to find the shot, but I point to that example in order to show that it is absurd to say that some lead shot in a bird, a rabbit or a hare makes the article of food unfit for human consumption. It is not unfit for human consumption. So, also, there is the illustration which Ormerod J. put in the course of the argument. Everyone knows that when children are about at Christmas time threepenny pieces are put into plum puddings. That does not make the plum puddings unfit for human consumption. Probably someone says: "Look out, do not swallow the threepenny pieces." The threepenny pieces are not fit for human consumption, but the pudding is.

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[2] (1950) 66 T.L.R. (Pt. 1) 296; [1950] 1 All E.R. 234.

[1] Ibid.

Section 9 of the Act comes under the heading "Sale of "Unsound Food," and shows, therefore, that it is dealing with the sale of what may be called unwholesome foods. It is the section called into force when a butcher is found to have bad meat, that is to say, meat that is going putrid, exposed in his shop for sale. As Mr. Burge has pointed out, section 3, which is the section to be brought into force if one is dealing with extraneous matter which has got into an article of food, but which has not otherwise affected it, provides for certain defences. Mr. Burge does not suggest that he could have pleaded one of those defences in this case; that is another matter. He points it out to show the distinction between the two classes of sections. There are certain definite defences provided in respect of the charges under section 3 which are different from those available, if any, under section 9. Further, the penalties under section 9 are altogether more severe than those under section 3. Moreover, when one is construing an Act of Parliament of this sort one has to use a certain modicum of common sense, and I cannot understand how the magistrate could have thought that a bun containing a small piece of metal could fairly be described as unfit for human consumption. The bun was perfectly good. It had in it this metal which ought not to have been there, and therefore it can be said that metal to the prejudice of the purchaser was in the bun, but that does not make the bun unfit for human consumption. This appeal, in my opinion, should clearly be allowed.

Ormerod J. I agree. There is only one small point in this case and that is whether a chocolate cream bun which had a small piece of metal in it, but which in all other respects was

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perfectly sound, was unfit for human consumption. I think there can be only one answer to that. It may be that in the circumstances there were grounds for complaint under section 3, but there were certainly none under section 9.

GLYN-JONES J. I agree. The present case, like most cases, reported and unreported, which have been decided under this statute really depends on its own facts, although it involves consideration of the meaning of the words "unfit for human "consumption" as used in section 9 of the statute. Reading the statute as a whole and bearing in mind that this is an offence which could have been dealt with under section 3, I have no hesitation at all in agreeing with what has been said in the judgments already given, namely, that the presence of a small piece of metal, the size of which is not defined, in one of four chocolate cream buns sold by the appellants does not render either the parcel of four buns or that particular bun unfit for human consumption within the meaning of section 9 of the Food and Drugs Act, 1938. I agree that this appeal should be allowed.

*Appeal allowed.*

Solicitors: *Claude Barker & Partners; Sharpe, Pritchard & Co.*

E. M. W.

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1955
*Oct.* 24.

Lord Goddard C.J., Ormerod and Barry JJ.

## TURNER & SON LD. *v.* OWEN.

*Food and Drugs—Food—Unfit for human consumption—Sale of loaf containing piece of string—Prosecution for sale of food "unfit "for human consumption"—Charge not applicable—Food and Drugs Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 3, 9 (1).

*Justices—Appeal to Divisional Court—Costs—Convicted defendant wins appeal—Power of Divisional Court to order him costs in court below.*

A loaf of bread bought from a shop was found to contain a piece of string. The bakers of the bread were prosecuted under section 9 (1) of the Food and Drugs Act, 1938, for selling food which was unfit for human consumption. At the hearing before the justices an adjournment was asked for by the defendants on the ground that the same point was under appeal in another case. An adjournment was refused and the defendants were convicted. They appealed:—

*Held*, allowing the appeal, (1) that the loaf was not unfit for human consumption within section 9 (1).

*J. Miller Ld.* v. *Battersea Borough Council,* ante, p. 43; [1955] 3 All E.R. 559 followed.

(2) That the Divisional Court had power, in quashing the conviction, to order that the costs incurred by the defendants before the justices should be allowed them, and, in the circumstances, an order would be made that the defendants recover against the prosecutor the sum of £7 7s.

CASE STATED by Nottingham justices.

On April 27, 1955, the prosecutor, Thomas Joseph Owen, acting on behalf of the City of Nottingham, being the Food and Drugs authority concerned, preferred an information against the defendants, Turner & Son Ld., that J. Lyons & Co. Ld. on March 4, 1955, at 33, Long Row, Nottingham, did sell an article of food, namely, a Hovis loaf, intended but unfit for human consumption, contrary to section 9 of the Food and Drugs Act, 1938, and the prosecutor, being reasonably satisfied that the offence was due to the act or default of the defendants, and that J. Lyons & Co. Ld. could establish a defence under section 83 (1) of the Act of 1938, applied that the defendants should be summoned to answer the information in accordance with section 83 (3).

On May 13, 1955, the justices heard the information and found the following facts: On Friday, March 4, 1955, a small Hovis loaf was purchased from the tea shop of J. Lyons & Co. Ld. at 33, Long Row, Nottingham, by Mary Sheldon. On Sunday, March 6, the purchaser found that she could not cut through the loaf because of a piece of string therein. The loaf had been purchased by J. Lyons & Co. Ld. from the defendants, by whom it had been baked. On March 7, 1955, a sanitary inspector in the employment of the Nottingham Corporation saw the managing director of the defendants and the bakehouse manager. He showed the loaf to them. The explanation they offered was that the string had probably attached a label to the sack of Hovis flour of which the loaf was made, and had inadvertently dropped into the flour during the breadmaking process. It was not their practice to sieve Hovis flour as that would remove the coarse particles. Apart from the presence of the string the bread appeared to be in good condition. The justices examined the loaf and found a coarse piece of string protruding from it. No evidence was called for the defence.

It was contended on behalf of the defendants that the evidence did not support a conviction under section 9 of the Food and Drugs Act, 1938, because, apart from the string, the

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loaf in itself was not unfit for human consumption; that section 9 was directed against unsound food, and that section 9 should be read in conjunction with section 10, and showed that unsound food meant food permeated with unsoundness or inherently unsound, and the loaf in the present case was not; that if an offence had been committed it was an offence against section 3 and not section 9; that there was a clear distinction between section 3 and section 9, and in support of that it was pointed out that there were statutory defences under section 3 which were not applicable to section 9, and, further, in certain cases, section 9 carried heavier penalties.

It was contended by the prosecutor that one set of circumstances could give rise to more than one offence, and that while the evidence might disclose an offence against section 3, an offence had been committed against section 9; that the loaf had to be taken as a whole, and the presence of a foreign body made the loaf unfit for human consumption; that there was evidence before the court that the loaf was unfit for human consumption.

The justices were of the opinion that the loaf was unfit for human consumption, and no evidence having been called for the defence, the justices found the case proved and fined the defendants £5 and ordered them to pay £1 costs.

The defendants appealed.

*Mervyn Griffith-Jones* for the defendants. The point is the same as that decided by this court in *J. Miller Ld.* v. *Battersea Borough Council*,[1] where a piece of metal was found in a bun, and the court decided that section 9 was not the appropriate section under which to prefer an information. In the court below an adjournment was asked for because it was known that there would be an appeal in *Miller's* case. This was granted for 14 days, but as there was no information when that appeal would be heard, a further adjournment was refused. In the circumstances, an order for the costs incurred by the defendants before the justices is asked for.

*Elson Rees* for the prosecutor. It is conceded that, in view of the decision in *Miller's* case, there is no answer to the appeal. As to the matter of costs, it was a question how long the prosecution should wait for the decision in a similar case under appeal.

LORD GODDARD C.J. The only complaint against this loaf was that there was a small piece of string in it, which the defendants explained probably got into the flour off the label. The presence of a piece of string in the loaf does not make the loaf unfit for human consumption. It may be that an information can be preferred against the seller under section 3 of the Act of 1938 for selling food which is not of the nature, substance or quality demanded because it has something in it which it ought not to have. *J. Miller Ld.* v. *Battersea Borough Council,*[1] which governs the present case, was a case in which an inconsiderable piece of metal had got into a cream bun. The cream bun was perfectly good as a cream bun, and so here, this Hovis loaf was perfectly good as a loaf. To say that it was unfit for human consumption is absurd. Section 9 is a section which creates a serious offence and exposes the defendant to imprisonment, because it is aimed at a tradesman who sells food which it would be a danger to the public to eat. The most common case which comes before the court of food being unfit for human consumption is when meat or fish is found to be bad. Because by some pure accident a little foreign body gets into a perfectly good loaf is no reason for saying that the food is unfit for human consumption, and that is what we held in *Miller's* case.[1] So it is not pretended that this conviction can be upheld, and it will be quashed with the costs of this appeal.

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[1] Ante, p. 43; [1955] 3 All E.R. 559.

Mr. Griffith-Jones has asked us to make an order for the costs in the court below. I am not sure that there is any authority on this matter, but it seems to the court that they must have power to deal with the costs in cases in which they think fit. Of course, in any case where the conviction is quashed, it would result in any costs which the successful appellant had been ordered to pay in the court below being returned to him. The question is whether this court, in quashing the conviction, can order that the costs he has incurred in the justices' court should be allowed to him. The matter is not clear, but at any rate an order of that nature has been made in at least two cases. The last case was *Mills & Rockleys Ld.* v. *Leicester City Council,*[2] heard on January 29, 1946, when, in setting aside an enforcement order under the Town and Country Planning (Interim Developments) Act, 1943, the appellants, who were unsuccessful in the court below, were given 25 guineas costs by this court as their costs in the court below.

It does not follow that in every case in which the court sets aside the conviction we should give the successful appellant the costs, but there are two reasons why we think that we can give costs in this case. One is, that we think that these prosecutions ought to be launched with much greater care. People ought not to be charged under a section creating a very serious offence when the information ought to have been preferred under another section concerned with the far less serious offence. The other point is, that when this case was coming on before the justices it was known that *Miller's* case[3] was under appeal to this court, although it had not actually been entered. Application had been made for a case to be stated, which had been granted, though the case was not actually set down in the list. I do not know that that is always a good reason for granting an adjournment, because justices might think in some cases it was desirable to get the case on quickly; but I think that it would have been a very good thing in the present case if some further adjournment had been granted in order to find out what was the state of affairs with regard to *Miller's* case.[3]

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[1] Ante, p. 43; [1955] 3 All E.R. 559.

[2] [1946] K.B. 315; 62 T.L.R. 246; [1946] 1 All E.R. 426.

We think, therefore, that in the present case we should say that the defendants in the court below ought to have something for costs. The difficulty is, that when justices make an order for costs under the powers given them by the Costs in Criminal Cases Act, 1952, they have to fix a sum. There is no provision in the Summary Jurisdiction Acts for taxing the costs, and the justices have to consider, if they are giving costs, whether they are ordering them to be paid by the prosecutor or by the defendant, and what is a fair sum bearing in mind where the witnesses have to come from, and whether there are expert witnesses. All those matters have to be taken into account.

In the present case we are told that no witnesses were called for the defence. Every fact was agreed and, therefore, the only costs which the defendants or Messrs. Lyons have had to pay are for the attendance of a solicitor before the justices to argue the case. But we have come to the conclusion that as there was a solicitor who had to appear and obtain an adjournment in the first instance, and ask for a second adjournment, a fair sum to allow will be £7 7s. We shall set this order aside, quash the conviction with costs here, and order also that the defendants will recover against the prosecutor the sum of £7 7s. costs in the court below. In certain cases we might send the case back to the justices to consider the matter, because there have been many cases in which we would not have had enough information to enable us to assess a fair sum. In this case we have, and that is the order we make.

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[3] Ante, p. 43.

ORMEROD J. I agree.

BARRY J. I agree.

*Appeal allowed.*

Solicitors: *Sidney C. Elphick for Clayton, Massey & Mason, Nottingham; Sharpe, Pritchard & Co. for Town Clerk, Nottingham.*

J. D. P.

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## NATIONAL ASSISTANCE BOARD *v.* MITCHELL.

1955
*Oct.* 14.

Lord Goddard C.J., Ormerod and Glyn-Jones JJ.

*Bastardy—Affiliation—National assistance—Application by National Assistance Board for order against putative father—No payments by putative father with reference to children within one year of their birth—Right of board to order—National Assistance Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 44 (2)—*Bastardy Laws Amendment Act,* 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

*National Assistance.*

In 1954 the National Assistance Board, having given financial assistance towards the maintenance of twin bastard children born in 1947, applied under section 44 (2) of the National Assistance Act, 1948, for two summonses to be served under section 3 of the Bastardy Laws Amendment Act, 1872, against the respondent, who was alleged to be the children's father. The mother had not obtained an affiliation order against the respondent and although he admitted paternity he at no time made any payment towards their maintenance. The magistrate refused to make an order on the ground, inter alia, that the board could not be in a better position than the mother, who was precluded from obtaining an affiliation order as more than 12 months had elapsed since the births and the respondent had paid nothing towards the children's maintenance:—

*Held,* that the board's right to apply for an order under the Act of 1948 was entirely separate from the mother's right under the Act of 1872; and provided that the board applied within three years of the date on which they last gave assistance they were entitled to apply for an order on proving that the children were bastards in respect of whom an order could have been made under the Act of 1872.

*National Assistance Board* v. *Parkes* [1955] 2 Q.B. 506; [1955] 3 All E.R. 1 applied.

[Reported by E. J. BARTON, Esq., Barrister-at-Law.]

1955

National Assistance Board v. Mitchell.

CASE STATED by a stipendiary magistrate sitting at Woolwich.

On December 16, 1954, two complaints were preferred by the National Assistance Board against the respondent, James Bryce Mitchell, stating that he was alleged by Violet Mary Fennessey to be the father of her twin children born on September 30, 1947; that assistance had been given to the said children within the three years previous to December 16, 1954; and applying under section 44 (2) of the National Assistance Act, 1948,[1] for summonses under the Bastardy Laws Amendment Act, 1872, s. 3.[2]

On January 25 and February 17, 1955, the following facts were found by the magistrate. Violet Mary Fennessey was a married woman living apart from her husband, and there was a magistrates' court order made against the husband on June 21, 1945, which was not proved. She gave birth to the twins on September 30, 1947, and named her husband as the father when registering their births. She had been having sexual intercourse with the respondent for a considerable period, including Christmas, 1946, and the respondent had acknowledged the children as his own both before and after their birth. In February, 1951, the respondent had signed a form admitting paternity of the twins and had offered to pay the board 8s. per week in respect of each of them, but he never in fact made any payment. Assistance was given in respect of the children at the weekly rate of 13s. 6d.

The magistrate refused to issue the orders on the ground, inter alia, that the mother of the children could not have obtained an order as no payments had been made within 12 months of their birth, and that the board could not be in a better position than the mother in applying for an order.

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[1] National Assistance Act, 1948, s. 44 (2): "If no affiliation order is "in force, the board or local autho-"rity may within three years from "the time when the assistance was "given or accommodation provided "make application to a court of sum-"mary jurisdiction having jurisdic-"tion in the place where the mother "of the child resides for a summons "to be served under section three of "the Bastardy Laws Amendment "Act, 1872."

"(3) In any proceedings on an "application under the last foregoing "subsection the court shall hear such "evidence as the board or local "authority may produce, in addition "to the evidence required to be "heard by section four of the said "Act of 1872, and shall in all other "respects, but subject to the pro-"visions of the next following "subsection, proceed as on an appli-"cation made by the mother under "the said section three."

[2] Bastardy Laws Amendment Act, 1872, s. 3: "Any single woman who "may be with child or who may be "delivered of a bastard child may "either before the birth or at any time "within twelve months from the birth "of such child, or at any time there-"after, upon proof that the man "alleged to be the father of such child "has within the twelve months next "after the birth of such child paid "money for its maintenance . . . "make application . . . for a sum-"mons to be served on the man "alleged by her to be father of the "child. . . ."

The board appealed.

*Rodger Winn* for the board. Section 3 of the Bastardy Laws Amendment Act, 1872, lays down the qualifications a mother must show before a summons can issue, and section 4 lays down what she must prove to obtain an order. Under section 44 (2) of the National Assistance Act, 1948, the board can apply for the issue of a summons in the same way as a mother can apply under section 3 of the Act of 1872, and to obtain an order the board, like the mother, must fulfil the requirements of section 4 of the Act of 1872. Section 44 of the Act of 1948 replaced a similar provision, without a time limit, relating to poor law guardians in section 5 of the Bastardy Laws Amendment Act, 1873. Parliament could, if they wished, have placed qualifications on section 44 (2) of the Act of 1948, but they have not done so, and, following *National Assistance Board* v. *Parkes*,[3] it means that the rights of the board are not identical with or to be identified with the rights of a wife or mother. The board has a right to be a party not limited by the mother's rights or demerits.

As to when a married woman is single for the purposes of the Bastardy Acts, where there is a magistrates' court order with a non-cohabitation clause, *Taylor* v. *Parry*[4] is some authority for saying that she should be treated as a single woman.

The respondent did not appear.

LORD GODDARD C.J. This is a case stated by the magistrate of Woolwich magistrate's court before whom complaints were preferred by the National Assistance Board with a view to obtaining orders in bastardy against the respondent, who did not appear, in respect of two children who were born on September 30, 1947.

The facts stated by the magistrate go to show that the mother of the children was living apart from her husband and had apparently obtained an order against her husband at the magistrates' court at Ipswich in June, 1945. The magistrate says that there was no proof of the nature of such order, but Mr. Winn tells us that in fact the order was produced at a later stage, although we cannot look at it because it is only referred to in the case as not having been proved.

[3] [1955] 2 Q.B. 506; [1955] 3 All E.R. 1.

[4] [1951] 2 K.B. 442; [1951] 1 T.L.R. 509; [1951] 1 All E.R. 355.

She gave birth to the children in question in September, 1947. She named her husband as the father when registering the birth of the children, but the magistrate finds that the respondent and the mother had sexual intercourse over a considerable period, including Christmas, 1946, and that the respondent acknowledged the children as his own both before and after their birth. Although he signed the form admitting the paternity of the children and offered to pay the board 8s. a week, he never paid, and the board have now taken proceedings against him to get an order to contribute towards the expense to which the board have been put in maintaining these children.

The magistrate held: "Section 44 of the National Assistance Act, 1948, did not enlarge the basis upon which a mother could obtain an order under section 3 of the Bastardy Laws Amendment Act, 1872, but merely determined the time limits for applications made by the National Assistance Board; that the requirements of the said section 3 were not fulfilled in that the mother could not have obtained an order and therefore the board could not obtain such an order."

There are other findings which I will consider hereafter, but, as I understand it, the magistrate's view was that, as the respondent had in fact made no payments, and as more than 12 months had expired from the date of the children's birth, the mother could not have obtained an order, and therefore the board could not obtain an order.

In that respect I think that the magistrate was clearly wrong, because section 44 (2) of the National Assistance Act, 1948, under which the board applied, is in these terms: [His Lordship read section 44 (2) and (3), and continued:] That seems to me to be a procedural section.

It has been held both by this court [1] and the Court of Appeal [2] in *National Assistance Board* v. *Parkes* that the right which is given to the board under this Act to make these applications is a right which is independent of the mother's right. It is a right of their own. It may well be that the mother cannot apply for an order in bastardy because she could not show that the conditions of the Bastardy Laws Amendment Act, so far as they apply to her, have been fulfilled. She would have to show, if she were applying more than 12 months after the birth of the child, that the respondent had made payments in respect of the maintenance of the child within 12 months of its birth. If that were so, what is the point of saying that the board may within three years from the time when the assistance was given apply for a bastardy order? It is, in my judgment, an entirely separate right, and provided that the board apply within three years of the time when they have last given assistance it seems to me that they are entitled to apply for an order, if they can prove that the child is a bastard child and one in respect of whom an order could be made under the Act of 1872, ignoring the question of the time limit which is therein imposed upon the mother. I think, therefore, that the view which the magistrate took and which he set out in the first paragraph of his opinion was wrong, and that the board have a right to apply.

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[1] [1955] 1 Q.B. 486; [1955] 1 All E.R. 700.

[2] [1955] 2 Q.B. 506; [1955] 3 All E.R. 1.

The only other points that arise in the case are these. The magistrate held that "the mother having at the time of registering the birth of the children declared that her husband was "their father, this court is not competent to adjudge them now "to be illegitimate." Secondly, he said: "I was not satisfied "that there was sufficient proof to establish the woman's status "as a 'single woman' within the meaning of the Bastardy Acts, "and I accordingly dismissed those complaints."

So far as the second point is concerned, I think that the National Assistance Board should show, if they can, that the children are bastard children. They will have to show that the mother was a single woman within the meaning of the cases. I think that the case must go back to the magistrate with a direction that he should continue to hear this case independent of the view that he set out in paragraph 7 (a) of the case. He must decide whether, having regard to the various decisions with regard to a married woman being regarded as a single woman for the purposes of the Bastardy Acts, this woman was a single woman. It appears to the court strongly probable that she was. She was living altogether apart from her husband, quite apart from the question of the time of the children's conception, and independent of the fact that the man has admitted that he is the father of these children. There is, I think, no reason why, with the many cases which have been decided upon this point, the magistrate should have any difficulty in finding that the woman was a single woman within the meaning of the Bastardy Acts.

For these reasons I think that the case must go back to the magistrate with a direction further to hear the case on the question whether the mother was a single woman within the meaning of the Bastardy Acts and with an intimation that the view that he expressed upon the other point was wrong.

ORMEROD J. I agree. Section 3 of the Bastardy Laws Amendment Act, 1872, provides that any single woman who is with child or one who is delivered of a child may start proceedings against the putative father under certain circumstances either before a child is born or within 12 months after the birth of the child, and, unless there is evidence that a payment had been made by the putative father within the period of 12 months, she is barred from bringing proceedings at any time thereafter. If, however, there is evidence of a payment by the putative father in respect of the child within 12 months of its birth, then the mother may start proceedings at any later time.

Section 44 (2) of the National Assistance Act, 1948, provides that if there is no affiliation order in force, the board or local authority who have had to make payments in respect of national assistance with regard to the child may within three years from the time that such assistance is given apply for a summons to be served under section 3 of the Bastardy Laws Amendment Act, 1872.

In this case the magistrate, having considered the board's application in respect of the maintenance of these two children, came to the conclusion that the effect of the whole subsection of the Act of 1948 is not to give any new power to the board or to anybody else, but merely to limit the power which the mother of an illegitimate child has by virtue of section 3 of the Act of 1872 if she can produce evidence that payments have been made within a year of the birth of the child. That appears to me to be the wrong way of looking at the section. In my view it is clear that the effect of section 44 (2) and (3) is to give to the board a right to start proceedings against the putative father, if there is no affiliation order in force, for the recovery of payments made for national assistance in respect of an illegitimate child provided that those proceedings are begun within three years of the time when the assistance was given. The only limitation upon that right is that the fatherhood of the putative father must be proved by evidence in accordance with the terms of section 4 of the Act of 1872. For that reason I am satisfied that the magistrate was wrong in the view which he took of section 44, and this case must go back to him to decide the matters which are left undecided at the moment, namely, whether in the circumstances an order should be made, having regard to the fact that at the moment the magistrate is not satisfied that there is sufficient proof that the mother of the child is a single woman. For these reasons I agree with the judgment of the Lord Chief Justice.

GLYN-JONES J. I agree. I think that the meaning which the magistrate put upon section 44 would have this result, that the statute would give the board no more than a right to enforce any remedies that the mother might have. My view of the statute is that it creates a wholly independent right which is vested in the board and that the only conditions imposed upon the right of the board to apply to enforce their right to a contribution are those contained in subsection (2). First, the application may not be made unless the board has given assistance or provided accommodation in respect of the illegitimate child; and secondly, the application must be made within three years of the time when that assistance by way of money or accommodation was given. The magistrate has read the words "in all other "respects" in subsection (3) as if they added to the provisions of subsection (2) a requirement that the board should not be permitted to make their application more than 12 months after the birth of the child unless the putative father had made some payment during those 12 months. I think that the words "in "all other respects" can be given a satisfactory meaning without reading them as incorporating into the proceedings by the board the limitation of time imposed upon the mother. I agree with the judgments which have been given.

*Appeal allowed.*
*Case remitted.*

Solicitor: *Solicitor, National Assistance Board.*

## GIBBONS *v.* KAHL.

1955
*Oct.* 20.

Lord Goddard C.J., Ormerod and Barry JJ.

*Road Traffic—Pedestrian crossing—Duty of drivers—Crossing obscured by stationary vehicle—Pedestrian hit by approaching vehicle—Pedestrian Crossings Regulations,* 1954 (*S.I.* 1954, *No.* 370), *reg.* 4.

*Road Traffic—Careless driving—Question of fact for justices—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12 (1).

The driver of a trolley bus was approaching a pedestrian crossing when three children stepped onto the crossing. The driver gave a hand signal to slow down, brought his bus to a stop on the near side of the road and waved the children across. The respondent, who was travelling in his motor-car in the same direction as the

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bus, saw the bus driver's signal, but did not see the children on the crossing until they had passed in front of the bus. He failed to stop in time and hit one of the children. On a charge under regulation 4 of the Pedestrian Crossings Regulations, 1954:—

*Held*, that it was the duty of a motorist approaching a pedestrian crossing to drive in such a way that he could stop if there was a pedestrian whose presence on the crossing was hidden by other traffic; accordingly, in the circumstances, the respondent was guilty of an offence against the regulations.

*Leicester* v. *Pearson* [1952] 2 Q.B. 668; [1952] 1 T.L.R. 1537; [1952] 2 All E.R. 71 distinguished.

The court did not as a general rule interfere with a decision of justices that a person was not driving without due care and attention contrary to section 12 (1) of the Road Traffic Act, 1930: the court was not bound to say that they were acting perversely.

Case stated by Edmonton justices.

The respondent, Adolph Max Kahl, was charged on two informations preferred by the appellant, Donald Gibbons, first, with driving a motor-vehicle at Bruce Grove, Tottenham, on January 30, 1955, without due care and attention contrary to section 12 (1) of the Road Traffic Act, 1930; secondly, at the same time and place, with failing to accord precedence to a foot passenger who was on the carriageway within the limits of an uncontrolled crossing before the vehicle or any part thereof had come on to the carriageway within those limits, contrary to regulations 4 and 9 of the Pedestrian Crossings Regulations, 1954.[1]

The justices found the following facts. At about 1.0 p.m. on Sunday, January 30, 1955, a trolley bus driver was driving his bus at about 20 miles an hour along Bruce Grove. When between 20 and 25 yards from a pedestrian crossing, three children stepped on to the crossing, which was a correctly marked uncontrolled crossing with flashing beacons within the terms of the Pedestrian Crossings Regulations, 1954. The bus driver immediately gave a slow-down hand signal, gradually braked to a stop in front of the crossing, and waved to the three children to cross the road. The children, aged about 10, five and four years, had stopped, but moved forward over the crossing sensibly when waved across. When the children had passed the front of the trolley bus (which was then stationary close to the nearside kerb) the respondent drove his Austin motor-car past the bus at a speed which was not fast and on to the crossing and knocked down one of the girls, who were about 22 feet into the crossing from the respondent's nearside pavement. The width of Bruce Grove at that point was about 33 feet and the offside of the trolley bus was 12 feet from the nearside kerb. Shortly after the accident the respondent's car was found partly over the crossing with its front two feet from the far side of the crossing, and with its nearside 17½ feet from the nearside kerb. At the material times the road was dry and the weather was good, and there were found two tyre marks from the rear of the respondent's car stretching back along Bruce Grove for a distance of 18½ feet. At the time the respondent said to the appellant: "I was "travelling in the same direction as the bus—he put his hand "out and I stopped immediately and the right hand bumper "caught them." The respondent knew he was approaching a crossing, saw the trolley bus driver's hand signal, and was able to see everything in front of him clearly, but did not see the children on the crossing until they had passed in front of the bus.

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[1] Pedestrian Crossings Regulations, 1954, reg. 4: "Every foot-"passenger on the carriageway with-"in the limits of an uncontrolled "crossing shall have precedence "within those limits over any vehicle "and the driver of the vehicle shall "accord such precedence to the foot-"passenger, if the foot-passenger is "on the carriageway within those "limits before the vehicle or any "part thereof has come on to the "carriageway within those limits."

It was contended by the appellant, first, that the respondent could not have been driving with due care and attention or he would not have had to stop immediately as he claimed at the time and would have been ready and able to draw up at the crossing; that as the children, walking sensibly, had gone at least 10 feet past the offside of the trolley bus (that is, 22 feet from the pavement) before being hit by his offside bumper he had ample warning and time to apply his brakes if he had been keeping a proper look-out; and that he was not keeping a proper look-out or he would have seen, or heeded the bus driver's hand-signal given at least 60 feet before the crossing. Secondly, that the respondent had failed to accord precedence to a foot passenger within the meaning of the Pedestrian Crossings Regulations, 1954.

It was contended by the respondent that he had acted with all caution and had braked as soon as he saw the bus driver's hand signal, which was not before he was the length of the bus from the pedestrian crossing, and that, therefore, he had driven with due care and attention; and that he had not been negligent in his driving in any way and was accordingly not guilty of both charges.

The justices, being of the opinion that the facts disclosed raised some doubt as to whether the respondent had taken all due care in his driving or had negligently failed to accord precedence to foot passengers on a pedestrian crossing, resolved those doubts in his favour and accordingly dismissed both summonses.

The prosecutor appealed.

*Paul Wrightson* for the appellant. There are two points in this appeal. It is contended, first, that the justices were, in the circumstances of this case, perverse in dismissing the charge of careless driving.

[LORD GODDARD C.J. It is a very serious thing to say that a finding of justices is perverse. The justices were saying that they had a doubt in their minds.]

Yes, but there were facts found which show that the justices should have found the respondent guilty. If he had been looking he must have seen the children. The case shows that he knew he was approaching the crossing and saw the hand signal which was given about 20 to 25 yards from the crossing. He could not have been keeping a proper look-out.

[LORD GODDARD C.J. The justices said that he did approach at a slow speed, but did not manage to stop. Surely that is not careless driving!]

In *Marson* v. *Thompson* [2] the facts were very like the present, and there this court found that the justices had been perverse.

[LORD GODDARD C.J. That was a case in which there was a stationary bus, and the driver of the second bus drew out so that he was blocking the whole road.]

With regard to the incident on the pedestrian crossing, it has been laid down that if there was a finding of no negligence then no offence was committed.

[LORD GODDARD C.J. The point about the crossing is quite different from the first point. If you cannot see by reason of a vehicle on your near side, then you must stop.]

The basis of the justices' decision was that there was no negligence. It was argued that it did not require negligence, but was a case of absolute liability. If negligence is necessary, then driving without due care is also proved. The justices were very much influenced by *Leicester* v. *Pearson*.[3]

[LORD GODDARD C.J. That was a case of a car skidding. Assume that we are in your favour regarding the crossing, do you

[2] The Times, March 8, 1955.

[3] [1952] 2 Q.B. 668; [1952] 1 T.L.R. 1537; [1952] 2 All E.R. 71.

say that it necessarily follows that we should have to be in your favour on the first point?]

Yes.

[LORD GODDARD C.J. Are you saying if a man is guilty of a breach of the Pedestrian Crossings Regulations, he is to be prosecuted twice?]

Not in every case. The justices have in this case equated careless driving with the pedestrian crossing charge, which is a lesser duty. On the first point the facts were such that the justices should in law have found the offence proved. The respondent could not have been keeping a proper look-out because otherwise he would have applied his brakes in time.

On the second point, the facts in *Leicester* v. *Pearson* [3] were exceptional.

*David Fairbairn*, for the respondent, said that he was unable to resist the appeal on the pedestrian crossing point.

The court indicated that they did not desire to hear him on the first point.

LORD GODDARD C.J. This is a case stated by justices for the County of Middlesex sitting at Edmonton before whom two informations were preferred against the respondent arising out of the same incident. First, there was a charge of driving without due care and attention, and, secondly, a charge of failing to give precedence to a pedestrian on a pedestrian crossing. The justices dismissed both informations, and against both there is an appeal.

Mr. Fairbairn has very properly, in my opinion, agreed that he cannot support the justices' decision with regard to the pedestrian crossing offence. With regard to the other charge, this court never views with particular favour the police bringing an appeal on a question whether a person drove with due care and attention, because it is so essentially, as a general rule, a question for the justices. Merely because the police may have been disappointed in not getting a conviction is no reason for bringing an appeal unless the case shows real perversity on the part of justices. There have been cases from time to time where the evidence was so overwhelming that this court has interfered because in their opinion the justices must have given a decision on facts other than those which were proved before them; or if the case is so clear that there could be no possible answer to the case then, if justices have dismissed it, again one can say that it is a perverse finding. But it is not often that this court will say that the findings of justices are perverse. Even if we thought

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that we should differ on a particular question if we had heard the case, they have had the advantage of seeing the witnesses, and we have not, and I should be very sorry if we were to say that justices were perverse because they gave a decision on fact which did not commend itself to this court. We are bound by the facts found by the justices, and we can only go against those facts if we come to the conclusion that the justices are perverse, which may mean that they are not fit to be justices at all, or that they have taken into account matters which they ought not to have taken into account or shut their eyes to the obvious. I am not saying that it applies to these particular justices, but sometimes one may get new or inexperienced justices. They may come to an honest decision, but one to which perhaps more experienced justices would not come, but that in itself would not be a ground for this court interfering, because Parliament for hundreds of years has entrusted these questions of fact to justices and the power given to this court to interfere is very limited.

[His Lordship stated the facts and continued:] The justices have said that they thought that there was a doubt whether the respondent was driving with due care and attention, and it is quite possible, it seems to me, for a man to be driving with due care and attention though he may have failed to observe that somebody was on the pedestrian crossing. He had not realized quickly enough that there might be somebody on the crossing. If justices, in those circumstances, say: "We feel doubt as to "whether we ought to convict him of this offence," I do not think that it is for this court to interfere. It is a pure question of fact for the justices, and I do not feel that in a case of this description we are bound to say that the justices made a perverse finding, or that we can interfere with that finding.

There now comes the question of the pedestrian crossing. [His Lordship read regulation 4 of the Pedestrian Crossings Regulations, 1954, and continued:] In the present case the respondent failed to pull up in time so that in fact he did not give precedence to the people who were on the crossing at the time. If a vehicle is stationary at the crossing, and another vehicle comes up on the offside of the first vehicle, it is no answer to say: "I did not know people were on that crossing." The answer is: "You must approach that crossing so that you "can give precedence to people if they are there."

*Leicester* v. *Pearson*,[1] upon which it may be that the justices decided the present case, was a very special case. It was one in which we did not know the full facts. It was a dark night, it was raining, and the road was in bad order. The metropolitan magistrate found that the accident took place because the driver of the vehicle had not seen the pedestrian who came on the crossing and that he was not guilty of any negligence in not seeing him. We must suppose, especially as it was a metropolitan magistrate, that there were very peculiar facts in that case. The judgments run entirely on the finding that there was no negligence to be attributed to the driver at all; therefore it followed from that that we could not interfere with the finding.

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[1] [1952] 2 Q.B. 668.

In the present case, as he approached the crossing the respondent was guilty of no negligence at all, but when he got to the crossing I think he became under a duty to stop because the bus had stopped and, therefore, he should have realized that pedestrians were on the crossing. I think that probably he did realize that there were pedestrians on the crossing, because he was trying to reduce the pace of his car and came up very slowly, but with regard to these pedestrian crossings it is the duty of motorists to be able to stop before they get there unless they can see that there is nobody on the crossing. It seems to me that it would destroy the usefulness of the Pedestrian Crossings Regulations if anybody could say: "I did not see the people there and "I could not see them because something on my left hand was "stationary." The answer is that if there is a stationary vehicle on the near side and the driver of another vehicle approaching from behind cannot see whether there is anyone on the crossing, he ought to assume that there is because that is the reason why the vehicle on the near side has stopped. At any rate, it is for such a driver to make certain that pedestrians are not there; but I do not think that it follows, and I should be sorry to have to lay it down, that every time a person commits a breach of the Pedestrian Crossings Regulations he necessarily offends against the section of the Road Traffic Act governing careless driving. For these reasons, we cannot interfere with the decision of the justices on the first information, but we must send the case back to them on the second information with an intimation that an offence was proved.

ORMEROD J. I agree. With regard to the first offence, there is nothing that I wish to say except to confirm the view that there was evidence upon which the justices could act as they did, and to upset their decision on this particular charge would be to say that they were acting perversely, which is far from the case on the facts found by them.

So far as the second offence is concerned, I agree that this case should be sent back with the necessary directions to convict. It is the duty of any motorist to approach a pedestrian crossing in such a way that he can deal with the situation on the crossing when he gets there. He must be in a position and driving at such a speed that if anybody is on the crossing he is in a position to stop. If he cannot see by reason of other traffic on the road whether there is anybody on the crossing, I think it is his duty to drive in such a way that he can stop if in fact there is somebody whose position on the crossing is masked by other traffic on his near side. In those circumstances, I think it is clear that the respondent offended; he was not in a position to stop quickly enough when he came up to the pedestrian crossing, with the result that this accident occurred. I agree that the appeal must be allowed.

Barry J. I agree. *Leicester* v. *Pearson* [1] depends entirely on the finding that there was no negligence on the part of the motorist. From that I think it follows that the man was not in breach of any duty imposed by the regulations. Here, for the reasons given by my Lords, I am satisfied that this motorist ought to have anticipated that pedestrians might be emerging from the front of this bus; and, indeed, the fact that the bus had slowed down and stopped before the crossing, gave him ample opportunity for taking that view. In these circumstances, I am satisfied that there was an offence under the Pedestrian Crossings Regulations, 1954. For the reasons given by my Lords, I agree that we ought not to interfere with the justices on the information laying a charge under section 12 (1) of the Road Traffic Act, 1930.

*Appeal allowed in part.*

Solicitors: *Solicitor for Metropolitan Police; Avery, Son & Fairbairn.*

J. D. P.

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[1] [1952] 2 Q.B. 668.

## STRATH *v.* FOXON.

1955
*Oct.* 19, 28.

Lord Goddard C.J., Ormerod and Glyn-Jones JJ.

*Criminal Law—Brothel—Meaning—Premises divided into two flats by substantial door on stairs let to two prostitutes—Common street door—Common use of kitchen—No intention of common user other than kitchen—Separate lettings of each flat—Each flat used for purposes of prostitution exclusively by the tenant thereof—Premises not a brothel if only used by one woman—Question of fact for the magistrate—Criminal Law Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13 (3).

The defendant was charged with letting certain premises with the knowledge that they were to be used as a brothel contrary to section 13 (3) of the Criminal Law Amendment Act, 1885. The premises in question consisted of the first, second and third floors of a house to which access was obtained by the same street door and which were reached by the same staircase on which a substantial door fitted with a Yale lock divided the whole of the third floor from the lower ones so that the third floor was completely self-contained. The magistrate found that the defendant, knowing that they intended to use the premises for the purposes of prostitution, met, at the same time and place but by independent appointment, two women, and let the first and second floors to one and, as a separate letting, the third floor to the other at equal rents; that the tenant of the third floor (which had no kitchen) used the kitchen on the second floor, but, save for the kitchen, there was no intention of a common user; and that both tenants took a number of men into the premises for the purposes of prostitution, and for such purposes the first and second floors were used exclusively by the tenant thereof and the third floor only by its respective tenant. The magistrate considered that since there were separate lettings and no common user the premises could not in law constitute a brothel. On appeal by the prosecutor:—

*Held*, that premises could not be regarded as a brothel if they were used by one woman only, but that each case must depend on its own facts and, although it might be that in some cases the evidence would be such that the court would find that the arrangements made were a subterfuge to avoid the consequences of section 13, there was evidence in the present case to justify the magistrate's findings of fact that there were separate lettings of the two flats and no common user; and that, therefore, the court could not interfere with his decision.

*Singleton* v. *Ellison* [1895] 1 Q.B. 607; *Durose* v. *Wilson* (1907) 71 J.P. 263; and *Caldwell* v. *Leech* (1913) 109 L.T. 188; 29 T.L.R. 457 considered.

CASE STATED by a Bow Street magistrate.

An information was preferred against the defendant, one Dorothy Foxon, that she being the agent of the lessor or landlord

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of premises comprising the first, second and third floors of 45, Curzon Street, W.1, let the same on or about September 27, 1954, with the knowledge that they were to be used as a brothel, contrary to section 13 (3) of the Criminal Law Amendment Act, 1885,[1] and section 4 of the Criminal Law Amendment Act, 1912.

The magistrate found the following facts to be prima facie established at the close of the case for the prosecution. The premises in question consisted of the first, second and third floors, to which access was obtained by the same street door from Curzon Street, and which were reached by the same staircase on which a substantial door fitted with a Yale lock divided the whole of the third floor from the lower ones, and the third floor was, therefore, completely self-contained. The first and second floors comprised a sitting-room, bedroom, bathroom and kitchen, while the third floor consisted of a bedroom and another room which was indeterminately furnished as a bathroom. At all material times the defendant was employed as negotiator by a firm of estate agents and was authorized by the leasehold proprietor of the premises to act through the estate agents as agent in the letting of the premises. On September 27, 1954, the defendant met by independent appointment, but at the same time, a Mrs. Curtis and a Mrs. Bussutil, at a café in Shepherd Market, W.1, and as a result of a discussion which then took place the defendant, as agent for the leasehold proprietor, let the first and second floors of the premises to Mrs. Curtis at a furnished rental of £25 a week and, as a separate letting, the third floor to Mrs. Bussutil at the same furnished rental. Each tenant received a key to the street door, and Mrs. Bussutil received a key for the door to the third floor. At the time of the lettings the defendant knew both Mrs. Curtis and Mrs. Bussutil to be prostitutes, and that each of them proposed to use her own flat for the purposes of prostitution. Save for the kitchen, there was no intention of a common user or a user by any person other than the respective tenants. Both tenants, in fact, used the kitchen on the second floor for normal purposes, and from the contents of two cupboards in the kitchen containing crockery and kitchen utensils, it appeared that one cupboard contained articles belonging to Mrs. Curtis, and the other articles belonging to Mrs. Bussutil.

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[1] Criminal Law Amendment Act, 1885, s. 13: "Any person who . . . "(3) being the lessor or landlord of "any premises, or the agent of such "lessor or landlord, lets the same or "any part thereof with the knowledge "that such premises or some part "thereof are or is to be used as a "brothel, or is wilfully a party to "the continued use of such premises "or any part thereof as a brothel, "shall on summary conviction . . . "be liable . . ." to certain penalties.

Both tenants went into occupation under their respective tenancies on September 29, and, thereafter, in particular on October 18, 19 and 20, when observation was kept by police officers, both tenants took a number of men into the premises for the purposes of prostitution. For such purposes the first and second floors were used exclusively by Mrs. Curtis, and the third floor only by Mrs. Bussutil.

On behalf of the defendant it was contended at the close of the case for the prosecution that as there were separate lettings to each of the two prostitutes concerned and there was no evidence of common user the premises did not constitute a brothel.

On behalf of the prosecutor it was contended that, notwithstanding that there were separate lettings, the premises in their entirety did constitute a brothel in the circumstances.

The magistrate was of the opinion that since there were separate lettings and no common user the premises could not in law constitute a brothel and, accordingly, he dismissed the information without hearing evidence for the defence.

The prosecutor appealed.

*Sebag Shaw* for the prosecutor. The magistrate was wrong in holding that, on the facts found to be prima facie established by the prosecution, the premises could not in law constitute a brothel. There is no statutory definition of "brothel." In *Singleton* v. *Ellison*[2] it was held that a house occupied by one woman was not a brothel, but that case should be distinguished, for here the premises are divided into two flats and that decision cannot be applied piecemeal to each flat. The defendant in this case is charged under section 13 (3) of the Criminal Law Amendment Act, 1885, and what has to be considered is the meaning of the phrase "any premises" in that subsection. In *Durose* v. *Wilson*[3] a block of flats was held to constitute a brothel; what the defendant in that case, the porter of the flats, and the defendant in this case did goes to the nature of their connivance and not to the nature of the premises. If there is a substantial user of premises for the purposes of prostitution, then the premises constitute a brothel. It would be a surprising result if the mere presence of a door with a Yale lock meant that premises were not a brothel if they would otherwise have been a brothel. In *Durose*

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[2] [1895] 1 Q.B. 607.

[3] (1907) 71 J.P. 263; 21 Cox C.C. 421.

v. *Wilson* [4] Darling J. said [5] "it is stated in Hawkins' Pleas of "the Crown (3rd ed., Bk. 1, c. 74), that a lodger who keeps only "a single room for the use of bawdry is indictable for keeping "a bawdy house." [Reference was also made to *Caldwell* v. *Leech*.[6]]

[LORD GODDARD C.J. Your best point is that the fixing of the door was a subterfuge and that, although there were two flats, in fact and in truth there was only one letting, but the difficulty is that the magistrate has found as a fact that there were two genuine separate lettings.]

The premises must be considered in their entirety. Avory J. in *Winter* v. *Woolfe* [7] adopted a different definition of brothel from that adopted by the court in *Singleton* v. *Ellison* [8]; he said [9]: "I am content to accept the definition of a brothel given by "Grove and Lopes JJ. in the case of *Regina* v. *Justices of Parts* "*of Holland, Lincolnshire* [10] . . . '. . . that the premises were "'kept knowingly for the purposes of people having illicit sexual "'connexion there.'"

It is submitted that the word "premises" as used in section 13 (3) ought not to be given too narrow or pedantic a meaning, and that it should apply where premises are in fact used for the purposes of prostitution.

*Fenton Bresler* for the defendant. Where a set of rooms within four walls are separately let and used, whether or not they are a brothel is not a matter of geography. Premises are not a brothel merely because two women use them for the purposes of prostitution, and where, as here, there are separate lettings and each part let is used as separate premises, the test is whether there is a common user of the overall unit contained in the four walls. It is not a question of substantial user, but whether the premises are used by prostitutes indiscriminately.

If there is no common user, premises cannot constitute a brothel unless there is some element of unified control, as exemplified by that of the porter in *Durose* v. *Wilson*.[11] In that case there was also common user: see, in particular, the judgment of Lord Alverstone C.J.[12]

[LORD GODDARD C.J. All the judgments in that case go on different grounds.]

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[4] 71 J.P. 263.

[5] Ibid. 264.

[6] (1913) 109 L.T. 188; 29 T.L.R. 457.

[7] [1931] 1 K.B. 549; 47 T.L.R. 145.

[8] [1895] 1 Q.B. 607.

[9] [1931] 1 K.B. 549, 555.

[10] (1882) 46 J.P. 312, 313.

[11] 71 J.P. 263.

[12] Ibid. 264.

The observations of Darling J. in that case are prayed in aid; he said [13]: "These premises are absolutely under the control of "the appellant. The people who occupy the flats have no key of "the front door, and it would be to strain language in the cause "of immorality to hold that these premises are not properly "described as a brothel." Had there been a porter acting as a general factotum in this case the position would be different.

[He was stopped.]

*Sebag Shaw* in reply. Lord Alverstone C.J. in *Durose* v. *Wilson* [14] said that section 13 "does not mention specifically "single houses or flats, and the word 'premises' in section 13 (3) "may involve more or less than one house." That passage is prayed in aid, and, had the judgment stopped there, it would support the contention for the prosecution in this case.

*Cur. adv. vult.*

October 28. ORMEROD J. read the judgment of the court: The defendant, Dorothy Foxon, was charged upon an information that she being the agent of the lessor or landlord of premises comprising the first, second and third floors of 45, Curzon Street, W.1, let the same on or about September 27, 1954, with the knowledge that the premises were to be used as a brothel, contrary to section 13 (3) of the Criminal Law Amendment Act, 1885, and section 4 of the Criminal Law Amendment Act, 1912.

[His Lordship referred to the facts found by the magistrate, as set out above, and continued:] The magistrate found these facts after hearing the evidence for the prosecution and making a personal examination of the premises. He formed the opinion that since there were separate lettings and no common user the premises could not in law constitute a brothel, and dismissed the information without hearing evidence for the defence.

Section 13 of the Criminal Law Amendment Act, 1885, provides (inter alia) that "Any person who . . . (3) being the lessor "or landlord of any premises, or the agent of such lessor or land-"lord, lets the same or any part thereof with the knowledge that "such premises or some part thereof are or is to be used as a "brothel, or is wilfully a party to the continued use of such "premises or any part thereof as a brothel" shall on summary conviction be liable to penalties as provided by the section.

The question of what is a brothel under the section first came up for consideration by this court in *Singleton* v. *Ellison.*[1] In that case a woman occupied a house frequented day and night by a number of men for the purpose of committing fornication with her. No other woman lived in the house, or frequented it for the purpose of prostitution. It was held that she had not committed the offence of "keeping a brothel" within the meaning of section 13 (1) of the Act. Wills J., in a short judgment, said[2]: "A brothel is the same thing as a 'bawdy house'—a "term which has a well-known meaning as used by lawyers and "in Acts of Parliament. In its legal acceptation it applies to a "place resorted to by persons of both sexes for the purpose of "prostitution. It is certainly not applicable to the state of "things described by the magistrates in this case, where one "woman receives a number of men."

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[13] 71 J.P. 264.

[14] Ibid.

The question was further discussed in *Durose* v. *Wilson,*[3] a case where 12 of a block of 18 flats were let to known prostitutes. There was no evidence to show which flat was occupied by which woman. The porter in charge of the flats knew the purpose for which the women were using them, and after midnight when the street door was closed, it was his practice to unlock the door to admit the women and the men they had brought with them. The magistrate found that the building as a whole constituted one set of premises, and that the building as a whole was used as a brothel. This court upheld the magistrate's decision on his findings of fact, and because of these findings was able to distinguish the case from that of *Singleton* v. *Ellison.*[4]

It was further held in *Caldwell* v. *Leech,*[5] that as only one woman was using the premises in question for the purposes of prostitution the premises were not a brothel.

In view of these authorities it is clear that premises cannot be regarded as a brothel if they are used by one woman only. The only question, therefore, is whether the two flats in question were separate premises. Each of these cases must depend on its own facts, and it might well be that in some cases the evidence would be such that the court would find that the arrangements made were a subterfuge to avoid the consequences of section 13.

In the present case, however, the magistrate, after hearing the evidence and making a personal inspection of the premises, has found that there were separate lettings of the two flats and

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[1] [1895] 1 Q.B. 607.
[2] Ibid. 608.
[3] (1907) 71 J.P. 263.
[4] [1895] 1 Q.B. 607.
[5] (1913) 109 L.T. 188; 29 T.L.R. 457.

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no common user other than a joint user of the kitchen. There was evidence to justify his findings, and this court cannot therefore interfere with his decision. In our opinion this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Allen & Son; Bernard Samuel Berrick & Co.*

J. F. L.

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## FLOWERS *v.* GEORGE WIMPEY & CO. LTD.

[1954 F. 104.]

1955
*Jan.* 19, 20;
*July* 11, 20.

Devlin J.

*Damages—Personal injuries—Special damage—Loss of wages—Right to take into account value of any rights accrued or accruing in respect of industrial injury benefit, industrial disablement benefit or sickness benefit—"Injuries"—"Rights"—"Taken into account"—National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62)*—National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 67)*—Law Reform (Personal Injuries) Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1).

The Law Reform (Personal Injuries) Act, 1948, s. 2, provides: "(1) In an action for damages for personal injuries . . . there "shall in assessing those damages be taken into account, against "any loss of earnings or profits which has accrued or probably will "accrue to the injured person from the injuries, one half of the "value of any rights which have accrued or probably will accrue "to him therefrom in respect of industrial injury benefit, industrial "disablement benefit or sickness benefit for the five years beginning "with the time when the cause of action accrued. . . ."

On April 29, 1953, the plaintiff, in the course of his employment, was injured. He sustained severe bruising and shock. A tumour and a ganglion subsequently developed. In the result the plaintiff did not return to work until May, 1954.

The plaintiff brought an action for damages for personal injuries against his employers. Devlin J. found for the plaintiff, but found that neither the tumour nor the ganglion was caused by the accident, and that the court could take into account loss of earnings only during the limited period when the plaintiff was suffering from the bruising and the shock of the accident, which the court estimated at between three and four weeks.

Since the date of the accident the plaintiff had received in respect of industrial injury benefit and industrial disablement benefit sums exceeding twice the amount of the lost earnings so estimated, the authorities responsible for assessing such benefits having regarded the whole of his incapacity to be a result of the accident. He was still in receipt of a small disablement pension, and had also received sickness benefit:—

*Held*, (1) that for the purposes of section 2 (1) of the Act of 1948 "rights" was used not in a jurisprudential, but in a commercial, sense, for it comprehended benefits received and the right to any future benefits likely to be payable consequent on the blows constituting the accident; that the "value" of such "rights" was precisely the amounts paid or payable in respect of industrial injury benefit, industrial disablement benefit or sickness benefit; and that in respect of the industrial injury and industrial disablement benefit the court was not concerned to inquire whether such payments made to the plaintiff after the four weeks' period in question had not accrued to him by reason of the injury but by reason of a mistake made about the nature of the injury.

(2) That the expression "taken into account" was used in a book-keeping sense and did not confer upon the court any wide discretion as to what sums in respect of benefits received, or likely to be received, should be taken into consideration for the purposes of the section.

(3) That in the result, in view of the amounts already received by the plaintiff in respect of industrial injury benefit and industrial disablement benefit, the plaintiff was entitled to judgment for general damages only.

*Semble*. That on the findings of the court sickness benefit would not have to be taken into account, for under section 11 of the National Insurance Act, 1946, sickness benefit was payable in respect of any day of incapacity for work which formed part of a period of interruption of employment. The incapacity might follow upon an injury, but the event which brought the statute into operation was not the injury but the incapacity. The rights were, therefore, rights whose immediate source was the incapacity, and the question was left open whether or not the incapacity was caused by the injury. If it was, then the rights accrued from the injury; if it was not, then they did not. That was a point which the court must itself decide for the purpose of its own determination.

*Stott* v. *Sir William Arrol & Co. Ltd.* [1953] 2 Q.B. 92; [1953] 2 All E.R. 416 distinguished.

ACTION.

The plaintiff, John Edward Flowers, aged 42, was employed at the Isle of Grain Refinery, and on April 29, 1953, in the course of his work, he was injured by the sling of a travelling crane. He was struck on the legs above and below the knee and thrown to the ground. He sustained severe bruising and shock. He continued work for a couple of days, but saw his doctor at the week-end, who ordered him to stay at home. From May 4, 1953, he was paid industrial injury benefit at the rate of £4 7s. a week until August 30, 1953, when it was reduced to £3 5s. 6d. a week, at which rate it continued for the remainder of the

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prescribed statutory period. After he had been off work for a fortnight he complained of a swelling near the right knee joint. His doctor sent him to hospital where the swelling was diagnosed as a tumour, for which it was necessary to operate. The operation took place on July 8, 1953, and the tumour was removed.

Before the plaintiff was fit to go back to work he complained of a similar swelling in the left leg. This appeared to have been caused by a ganglion and was the subject of a minor operation in November, 1953. It was found necessary for the plaintiff to receive therapeutic treatment after both these operations, and his recovery was throughout delayed by his mental condition in that he suffered from what the doctors called "compensitis." The six months industrial injury benefit period expired about the end of October and from then until February 20, 1954, he received sickness benefit at the rate of £2 3s. a week. He did not in fact return to work until May 1, 1954. Before that date he had put in a claim for disablement benefit and his disability had been provisionally assessed at 10 per cent., and he was paid a disablement gratuity accordingly. (On January 28, 1955, another provisional assessment was made and the percentage of disablement was increased from 10 per cent. to 30 per cent., in consequence of which the plaintiff received a small weekly pension.) The plaintiff brought an action for damages for personal injuries alleging negligence at common law against his employers.

At the trial, which took place on January 19, 20, 1955, Devlin J. found for the plaintiff, but held that on the evidence before the court neither the tumour nor the ganglion was caused by the accident, and that the court could award damages only in respect of the bruising and could take into account loss of earnings only during the limited period in which the plaintiff was suffering from the bruising and the shock of the accident, which the court estimated at between three and four weeks. Accordingly, the plaintiff was awarded £25 general damages and special damages of £50 on the basis that the plaintiff lost earnings at the rate of £17 a week.

On the defendants raising the issue of what benefits accruing to the plaintiff under the Law Reform (Personal Injuries) Act, 1948, might be taken into account for the purpose of reducing the amount of the special damages payable by them, the court adjourned the hearing of argument upon this question in order to have the assistance of the Law Officers in determining it.

*Sir Harry Hylton-Foster Q.C., S.-G.* and *Rodger Winn* for the Minister of Pensions and National Insurance. The "rights" referred to in section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, are creatures of statute and, accordingly, in order to comprehend their nature, it is necessary to consider the relevant Acts: National Insurance (Industrial Injuries) Act, 1946, ss. 1, 2, 5, 7, 11 (1), 12, 17, 18, 25 (1), 36, 39 (1), 40, 44, 50, 51, 52; National Insurance Act, 1946, ss. 11, 28 (1), 30, 43, and National Insurance (Industrial Injuries) Act, 1953, s. 3. For the purposes of section 2 (1) of the Act of 1948 the court ought not to review the findings of the insurance officer or medical board in respect of an award of industrial injury benefit or disablement benefit in determining the "rights" to "be taken into account" under the section. A right to an award of benefit is subject to all the provisions and conditions of the relevant statute, and it is not a right to be determined by the court but is to be determined by the appropriate statutory body. Any other view would result in great procedural difficulties; for example, the court might find it necessary to hear additional medical evidence. Further, it might lead to injustice; for example, if the court were to award a larger sum by way of benefit than the appropriate statutory body would have awarded, since this larger sum would have to be taken into consideration and half of it deducted from the damages.

The award of benefit is made in respect of at least some injury occurring at the time of the relevant accident. It is the occurrence of such injury or injuries which gives rise to the statutory right to benefit.

The phrase "taken into account" means that the court is under a duty to make a mathematical calculation and deduct half the "value" of the rights in question: see *per* Lord Hewart C.J. in *Metropolitan Water Board* v. *St. Marylebone Assessment Committee*[1] on the meaning of the phrase "to take into account." The "value" of such "rights" is what is paid in respect of them under the relevant statute, neither more nor less, the court relying upon exact figures where payments have already been made and upon estimated figures in so far as the future is concerned.

Sickness benefit is in a different category from industrial injuries benefit and disablement benefit; it does not have to be "taken into account" in the present case. By virtue of section 11 of the National Insurance Act, 1946, sickness benefit is payable in respect of any day of incapacity for work which forms part of a period of interruption of employment. For sickness benefit to be payable, the incapacity need not be the result of an injury. It is the incapacity which brings the statute into operation and not necessarily an injury. The "rights," therefore, are rights whose immediate source is the incapacity. The court must determine, in each case, whether or not the incapacity is caused by the injury, and, accordingly, whether or not the "rights" accrue from the injury.

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[1] [1923] 1 K.B. 86, 99.

[Reference was also made to section 51 of the National Health Insurance Act, 1936; section 3 of the Law Reform (Personal Injuries) Act, 1948; *Ward* v. *Shell-Mex and B.P. Ltd.*,[2] and *Stott* v. *Sir William Arrol & Co. Ltd.*[3]]

*Stephen Chapman Q.C.* for the defendants. The argument for the Minister is adopted, except the submission concerning sickness benefit.

The court has awarded the plaintiff £25 general damages and special damages of £50 for loss of earnings. The total of benefits received to date by the plaintiff amounts to £178 13s. The whole of this sum must be taken into account for the purposes of section 2 (1) of the Act of 1948. Accordingly, since half of it is more than sufficient to extinguish the claim for loss of earnings, the plaintiff is only entitled to judgment for the £25 general damages.

As to the construction of section 2 (1), "injury" means any blow which occurs in the accident and everything which results from the blow; for example, a nervous or mental breakdown. "Injury" is not confined to a breaking of the skin or visible wound. For the purposes of section 2 (1), "rights" accrue from the moment there is an accident which gives the injured person a right to benefit under the relevant statute.

It is submitted that sickness benefit falls to be considered and taken into account within the meaning of section 2 (1) whenever, for any reason, that benefit is awarded for injuries arising out of an accident. In the present case the insurance officer took the view that the plaintiff's sickness was caused by the injury sustained in the accident. The court ought not to question that determination.

It is plain from the use of the imperative word "*shall*" in the phrase "shall . . . be taken into account" in section 2 (1) that it was not intended to confer a wide discretion on the court as to what amounts are to be taken into account. In so far as *Stott* v. *Sir William Arrol & Co. Ltd.*[3] is a decision to the contrary, it was wrongly decided.

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[2] [1952] 1 K.B. 280.

[3] [1953] 2 Q.B. 92.

*C. J. A. Doughty Q.C.* for the plaintiff. Section 2 (1) of the Act of 1948 is concerned with "rights," not "benefits." Accordingly, what the court has to "value" is what the plaintiff has a right to have under the relevant statute, and it follows that the court must determine on the evidence before it what the plaintiff ought to have received under the statute. In the present case the court has determined that the loss of earnings suffered by the plaintiff as a result of the accident was £50; in other words, that the period of disability caused by the casualty was four weeks. Accordingly, it is submitted that the right construction of the subsection requires only four weeks' benefit to be taken into consideration. The phrase "taken into account" confers upon the court a discretion; the subsection does not place a duty on the court to make a strict mathematical deduction: see the comparable section, section 51, of the National Health Insurance Act, 1936, and *Stott* v. *Sir William Arrol & Co. Ltd.*[3]

*Cur. adv. vult.*

1955. July 20. DEVLIN J. read the following judgment: I have already determined that as a result of the defendants' negligence the plaintiff lost earnings at the rate of £17 per week for a period of incapacity which I estimated as being between three and four weeks; special damage therefore amounts at most to £68. The plaintiff was during this period in receipt of industrial injury benefit and so I have to apply the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), which provides as follows:—

> "In an action for damages for personal injuries . . . there "shall in assessing those damages be taken into account, against "any loss of earnings or profits which has accrued or probably "will accrue to the injured person from the injuries, one half of "the value of any rights which have accrued or probably will "accrue to him therefrom in respect of industrial injury benefit, "industrial disablement benefit or sickness benefit for the five "years beginning with the time when the cause of action "accrued. . . ."

The plaintiff received benefit during the period of incapacity at the rate of £5 1s. 6d. per week. Half this figure for four weeks amounts to £10 3s., which would reduce the figure of £68 to

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[3] [1953] 2 Q.B. 92.

£57 17s. As I have said, I regard the period of incapacity as rather less than four weeks and I think that on this basis of calculation a fair figure to take as special damage would be the round sum of £50.

The defendants, however, submit that this is not the true basis. The plaintiff has been receiving benefits over a much longer period than four weeks, and totally much more than £10 3s. There is no doubt that for one cause or another he was incapable of work for a long period, and the authorities responsible for assessing the benefit took a more favourable view of the claim which he presented to them than I have done of the one which he made in this court; they regarded the whole of his incapacity as a result of the accident.

The total of the benefits which the plaintiff has received amounts to date to £178 13s., and he is still in receipt of a weekly sum of £1 0s. 3d. Mr Chapman submits that the total benefit falls to be taken into account under section 2 of the Act of 1948. If so, a half of it is more than sufficient to extinguish the whole claim for loss of earnings, and Mr. Chapman therefore submits that the plaintiff should have judgment for no more than £25, the sum that I have awarded as general damages.

This appears at first sight to be a startling submission. My first inclination would be to suppose that where there is a difference of view over the period of disability caused by the casualty, I should concern myself only with the period which I have found to be correct; if the plaintiff has obtained benefit for a longer period than I think correct, that is something that lies between him and the National Insurance authorities and does not concern me. Mr. Chapman, however, invites me to look at the matter rather differently. The benefits which the plaintiff receives are, he submits, the fruits of an insurance, to which both employer and employee contribute, and the terms of it are that payments made under the insurance are to be divided in the way in which the Act specifies. If the plaintiff obtains under the insurance scheme what this court must regard as a windfall, there is nothing inequitable in the notion that he should share that with the employers in the same way as he has to share the admittedly correct payments.

The point depends upon the construction of the section. It is a difficult and important one, and one which affects many members of the public not directly concerned with this case. Accordingly, I asked for the assistance of the Law Officers in determining it, and I have had the benefit of a very full and helpful argument by the Solicitor-General. The Solicitor-General began by summarizing the nature of the benefits with which section 2 of the Act of 1948 is dealing. I shall first set them out and then recapitulate the facts that I have already found in so far as they are relevant to this point, and then consider the points of construction that are raised under the section.

Section 2 of the Act of 1948 specifies three classes of benefits to be taken into account—industrial injury benefit, industrial disablement benefit and sickness benefit. Industrial injury benefit and industrial disablement benefit are paid under the National Insurance (Industrial Injuries) Act, 1946, and they are payable by virtue of section 7 of the Act in the case of an injured person who suffers personal injury by accident arising out of and in the course of his employment. If, as the result of the relevant injury, he is incapable of work, he is paid industrial injury benefit at a weekly rate during the period of incapacity. This period is not, however, to exceed six months. If at the end of that period he is, as the result of the relevant injury, suffering from loss of physical or mental faculty, the extent of his disability is assessed and he will be paid a disablement benefit stated in the form of a percentage which corresponds to the degree of his disablement. If a final assessment cannot at once be made, the matter proceeds by means of provisional assessments for limited periods. If the amount is small, the benefit takes the form of a lump sum gratuity; if it is larger, it takes the form of a disablement pension at a weekly rate. It is to be noted that while for this purpose it is necessary that the claimant should have a loss of faculty, that need not involve any loss of earning power, and a workman may, therefore, go back to his pre-accident rate of wage and still draw disablement benefit. Disablement benefit is, therefore, not compensation for incapacity, and an employee may after six months still be incapable of work. In such circumstances, although industrial benefit ceases, he can draw sickness benefit, which is payable under section 11 of the National Insurance Act, 1946. Sickness benefit is less to the extent of about one-third than the industrial injury benefit. Industrial injury benefit, while it is paid, comprehends sickness benefit, but sickness benefit has nothing to do with industrial injury as such. The former benefit is only payable if the injury is the result of an industrial accident, while the latter is payable in the case of any sort of sickness however caused.

It is convenient that I should state briefly how under the Act injury and disablement benefits are determined. Under section 25 there are provisions for the making of claims; and a group of sections in Part III of the Act, sections 36 to 52, provide for their determination. Certain medical questions—whether the accident has resulted in the loss of faculty and what is the extent of the disablement, and so on—are determined by a medical board or a medical appeal tribunal. These questions relate to disablement benefit. All questions concerning industrial injury benefit are determined in the first instance by an insurance officer. There are rights of appeal from his decision to local appeal tribunals and to the Industrial Injuries Commissioner. A claim for industrial injury benefit is submitted for a certain period, for example, for a month, and, if granted, benefit will be paid for that month. If a claim based on the same injury is made for the following month, there is nothing to prevent the insurance officer taking a different view of the cause of the injury and disallowing the claim. A decision given in respect of the preceding month could not, however, be altered except by the process of review as provided for in section 50. Under this section the insurance officer must be satisfied by fresh evidence that the decision was given in ignorance of, or was based on a mistake as to, some material fact, or that there has been a relevant change of circumstances. If a decision is reversed or varied, repayment is to be required of benefits mistakenly paid, unless it is shown that the claimant was acting in good faith in all respects as to the obtaining and receipt of the benefit. There are similar provisions in relation to disablement benefit and sickness benefit which I need not set out in detail. Subject to the prescribed right of appeal, the insurance officer's decision on injury benefit is final; and there was in this case no appeal.

[His Lordship stated the facts set out above and continued:] In fact, the tumour on the plaintiff's right leg had been in existence a long time before the accident and it would have had to have been operated upon anyway as soon as it was discovered. Whether this was known to the insurance officer or to the medical board, I do not know; it appears that his own doctor only knew of it the day preceding the trial before me. The trial took place on January 19, 1955, and on the evidence before me I held that neither the tumour nor the ganglion was caused by the accident and that I could award damages only in respect of the bruising and could take into account loss of earnings only during the limited period in which he was suffering from the bruising and the shock of the accident, which I estimated, as I have said, as between three and four weeks. On January 28 another provisional assessment was made and the percentage of disablement was increased from 10 per cent. to 30 per cent. Whether this was post or propter my decision I do not know. Obviously the question whether a pre-existing tumour is aggravated by a blow, to the extent that the blow can properly be described in law as a cause of the suffering resulting from the tumour, is one which may well cause a difference of medical opinion and upon which different findings may understandably be obtained. This is one of the reasons which makes it important to determine what is the true position under section 2 of the 1948 Act when different findings are made.

The argument of the Solicitor-General supports in general that which has been advanced by Mr. Chapman. He submits that the court ought not in effect to review the findings of the insurance officer, and that it would be very inconvenient if it attempted to do so: injury benefit is paid on the insurance officer's view of the facts and it is now impossible to say how much is attributable to the bruising and how much to the tumour and ganglion and its consequences. I agree, of course, that it is no part of my duty to review the findings of an insurance officer. But it is my duty to assess the damages and to inquire into any facts that may be relevant for the purpose of that assessment. I see no difficulty in such an inquiry and no need to question the insurance officer if such a course conflicts with the authority of *Ward* v. *Shell-Mex and B.P. Ltd.*[1] I should simply have to determine, as in fact I have done in this case, on the medical evidence laid before me what is the probable period of incapacity if the bruising alone is to be regarded. While the answer to that must to some extent be notional, this court is well used when assessing damages to dealing with matters of that kind. In truth, I think it is the Solicitor-General's construction that leads to the more difficult line of inquiry; for it might then be necessary to consider whether the insurance officer's decisions in the future would be likely to be affected by the decision of the court or by the evidence called before it. Let me illustrate from the facts of this case. Did the insurance officer when he made his determination know that the tumour was in existence before the accident? If not, is he likely in the light of this fresh evidence to alter his determination?

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[1] [1952] 1 K.B. 280; [1951] 2 T.L.R. 976; [1951] 2 All E.R. 904.

If he alters his determination, will it affect only the future or might he consider that the non-disclosure amounted to bad faith and require repayment of past amounts? Even if he did know of the tumour, might he be influenced in making future decisions by the views expressed by the medical witnesses for the defence before me if they were brought to his attention? These points do not, for reasons which I shall give later, in fact arise for consideration in this case. I mention them only to show the sort of difficulties that might arise.

I do not think these considerations or any other of the general considerations to which I have hitherto referred point to one construction or the other as being the more likely or the more reasonable one. It seems to me that it would be just as reasonable for Parliament to do the one thing or the other. It might have decided to treat payments made under the Act as if they were payments under an insurance policy in which the premium was shared, or it might have decided that earnings and benefits must correspond; it might or might not have had regard to the difficulties which might arise on either type of inquiry. I think my only course is to take the words which Parliament actually used and give them the meaning which in their context I think they should bear.

The first point that I think has to be determined is what is meant by the word "injuries" where it is used in the section. What has to be assessed is the value of any rights that have accrued or probably will accrue to the plaintiff "therefrom." "Therefrom" plainly means, if one reads back, "from the "injuries"; and the injuries referred to, if one reads further back still, are plainly those personal injuries for which damages are being assessed. Do these injuries mean the blow or blows inflicted on the plaintiff, or do they mean the various injuries from which in consequence he suffered or is said to have suffered —that is, the bruises, the tumour and the ganglion? If these three are all separate injuries within the meaning of the section, then it seems to me that the defendants' submission must necessarily fail. For the injuries for which I am assessing damages are solely the bruises, and what I should, therefore, have to inquire into would be the rights in respect of industrial injury benefit, etc., which accrue from the bruising. As I have already said, if that is the inquiry which the section says is to be made, I can see no insuperable difficulty in making it. But in my judgment that is not the meaning which should be given to the word "injuries."

In the first place, I attach no importance to the use of the plural rather than the singular. An action for "damages for "personal injuries" is a term well known to legal practitioners and the action will not fail merely because there is only one injury that could be proved. The noun is used collectively and because (as in this case, where the plaintiff was struck blows above and below the knee) there is usually more than one bodily injury arising from the same casualty. I observe that the term used in the National Insurance (Industrial Injuries) Act, 1946, is "personal injury" in the singular. I do not think, therefore, that the expression "personal injuries" necessarily points to the consequences of the blow rather than to the blow itself. Indeed, I do not think that it is intended to draw any distinction between the blows and their immediate consequences. The blows which the plaintiff sustained set up certain physical changes such as bruises and were capable of setting up or aggravating other physical changes such as tumours and ganglions. Such blows may set up also mental changes resulting from shock to the nervous system. In ordinary parlance the term "injuries" is used to describe both the initial blows and some of the more immediate consequences. Bruises would normally be comprehended in the term "injuries" in its ordinary use. Tumours might be; mental changes might not. The ordinary meaning is for the purposes of the Act supplemented by a statutory definition in section 3 which provides that the term "personal injury" is to include any disease and any impairment of a person's mental or physical condition. But I am not concerned to determine the point at which the mental or physical processes degenerate into something that is no longer an "injury." I am concerned to see at what point the process starts and the injury or group of injuries or complex of injuries (I think the terms are interchangeable) begins. I think that it plainly begins with the blows and what follows is all part of the same injury or group or complex of injuries. The bruising is one manifestation of the injury, and the tumour, if it is due to the blows, is another manifestation. They are not, for the purpose of the expression "personal injuries," new and separate injuries. When, therefore, I inquire under the section "what "rights accrue . . . from the injuries," I must ask myself what rights accrue from the blows.

Now, the rights that have to be valued are "in respect of "industrial injury benefit, industrial disablement benefit or "sickness benefit"—that is to say, they are rights arising under the statutes which provide for those benefits. I think the Solicitor-General is correct in his submission that these rights are worth what is paid in respect of them under the statute, neither more nor less. For example, if the claim is not put in within the prescribed period, they may be worth nothing. Since the statute prescribes that the insurance officer's decision is to be final, if he values them at nothing, they are in fact worth nothing. This is not because the insurance officer's view of the matter is necessarily any better than the court's, but because the right which has to be valued is not a right to the payment which the court thinks appropriate, but a right to the payment which the insurance officer thinks appropriate. In the same way, if I had to value rights arising out of a breach of contract, and the contract contained an arbitration clause and the arbitrator had made an award of damages, the value of the rights would be the amount of his award, and it would be quite irrelevant for me to inquire whether he had fallen into any error or not.

These considerations defeat, I think, what might otherwise be an attractive argument: that the payments made to the plaintiff after the four weeks' period have not accrued to him by reason of the injury but by reason of a mistake made about the nature of the injury. I think that a mistake in assessing the consequences of the blow is irrelevant; it is not a matter to be inquired into at all. The blow is the event which creates the right to benefit under the statute; the value of that right is what is paid under the statute in respect of the blow. The statute lays down its own processes, and I have to value what those processes produce. I am no more concerned with errors in the application of the process than I would be concerned if I had to value manufactured goods with errors in manufacture.

Mr. Doughty puts what is, I think, substantially the same argument in another form. He points out that the word used in the statute is "rights" and not "benefits." He therefore submits that what I have to value is what the plaintiff has a right to have under the statute and not what he actually gets. It is, therefore, my duty, he argues, to determine what, under my view of the facts, the plaintiff ought to have got under the statute. A good way of testing this argument is to inquire what the position would have been if the situation were reversed and the insurance officer had held that an injury which caused the plaintiff to be away from work was not caused by an industrial accident. If I held that it was and gave the plaintiff damages, ought I to deduct from the damages half the benefits which I thought he ought to have received? Mr. Doughty does not shrink from arguing that in such circumstances I ought. But nothing that I could say or do could make the insurance officer pay any benefits, so that I would be valuing at a sum of money rights which were in fact worthless. I do not think that the word "rights" in the statute is used jurisprudentially. Used, as it is, in connexion with a requirement that the rights should be valued, it is, I think, used in a commercial sense; rights under a contract, for example, may be valuable or not according to whether the promisor is solvent or not. If "rights" in this sense has the same meaning as benefits have, as Mr. Doughty argues, I do not think it is an objection. I think that in substance that is what in this context it does mean, and that the word is used because what has to be valued is not merely benefits that have been received but also the right to future benefits.

In my judgment, therefore, the rights which accrue from the injuries are the sums which are in fact paid or likely to be payable in accordance with the statute in respect of the injury or injuries which put the statute into operation, that is, the blows which constitute the accident.

Before I turn to a third disputed point of interpretation, I think that I ought to notice another interpretation for which no one in this case has contended. It is tempting to think that the intention of the legislature in section 2 was that like should be compared with like, and that the earnings or profits which were to be put on one side of the balance sheet should have measured against them benefits which correspond. That result might be achieved in the following way. The court has to determine in the first instance "loss of earnings or profits which has accrued "or probably will accrue." Earnings or profits accrue over a period, and there is therefore inherent in any assessment of amount a determination of the period during which the loss has been sustained. When the court turns to its next task of valuing the benefits, might it not appropriately value them over the period which it has already ascertained and for no longer? The difficulty about this construction is that it involves reading into the section a reference to a period which is not there. For this reason this construction was decisively rejected by Slade J. in *Stott* v. *Sir William Arrol & Co. Ltd.*,[2] and no one before me has challenged the correctness of his decision. Apart from this, the case does not help on the arguments that I have hitherto been considering. In that case the plaintiff sustained injuries which incapacitated him for five weeks and resulted in a loss of earnings which after the deduction of industrial injury benefit amounted to £41 6s. 9d. After he returned to work he suffered no loss of wages, but, none the less, received disablement benefit amounting to £126 13s. Slade J. decided that the employers were entitled to use one half of the disablement benefit so as to extinguish their remaining liability for loss of earnings. The case which I am considering is distinguishable on the ground that in *Stott* v. *Sir William Arrol & Co. Ltd.*[3] the disablement benefit was on any view of the section paid as the result of the injuries.

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[2] [1953] 2 Q.B. 92; [1953] 2 All E.R. 416.

The last point I have to consider is the meaning in the section of the phrase "taken into account." Mr. Chapman submits, and the argument of the Solicitor-General supports him, that "taken into account" means no more than that I must make as accurate a valuation as I can of the rights, relying upon exact figures where payments have already been made and upon estimated figures where the future is concerned. Mr. Doughty submits that the phrase gives me a discretion as to the way in which I value the rights.

I was referred to *Metropolitan Water Board* v. *St. Marylebone Assessment Committee*,[4] where Lord Hewart C.J. happily phrased the distinction. He said: "'To take into account' in "the sense of including figures in a mathematical calculation "is one thing; 'to take into account' in the sense of paying "attention to a matter in the course of an intellectual process "is quite another thing." In my judgment, the section I have to construe does not contemplate an intellectual process. There is no room for the exercise of any discretion, for nothing lies between giving effect to figures and estimates, on the one hand, and rewarding deserving plaintiffs and penalizing undeserving ones, on the other hand. Mr. Doughty submits that I ought to take the benefits into account only in respect of the period affected by the loss of earnings, and that any other result would be inequitable. That is inviting me to exercise my discretion in order to defeat the construction that I have just put upon the statute. A more appealing ground might, I think, be that I should exercise my discretion in order that the plaintiff should not be worse off than he would have been under the statute if

[3] [1953] 2 Q.B. 92.

[4] [1923] 1 K.B. 86, 99.

the insurance officer had taken the same view as myself. The insurance officer in effect gave him a sum which works out on the average at about £3 15s. per week, of which he can in effect keep only one-half, that is, £1 17s. 6d. Had the insurance officer taken my view of the facts, the plaintiff would have had sickness benefit at the rate of £2 3s. per week and retained it all; but then he would not have had any disablement benefit.

In my judgment, I have no discretion which would justify me in trying to evaluate matters of this sort. Mr. Doughty relied on the decision of Slade J., to which I have already referred. Slade J. thought that the words "taken into "account" implied a discretion and he stated that he did exercise his discretion. I think that he was using the term in a very limited sense. I daresay there may be a discretion in the sense that the court is not obliged to make exact calculations but can arrive at a round sum; I do not think that Slade J. can have meant that there was a discretion in the wider sense for which Mr. Doughty contends. Accordingly, I conclude that Mr. Chapman's argument succeeds, and that there should be judgment in this case for £25 only.

As I have had the benefit of a full argument from the Solicitor-General, I think that I ought to mention two points which were considered in the course of the argument, but upon which I have not for the purposes of this case got to reach a decision. The value of the benefits which the plaintiff has received to date as industrial injury or disablement benefit is large enough for one-half to extinguish the loss of earnings. I have been told by the Solicitor-General that no question will be raised about the plaintiff's good faith, and accordingly the payments that have been made to him are secure. Mr. Chapman, therefore, succeeds without having to raise any question upon sickness benefit paid in the past or about disablement pension that may be payable in the future or about the possibility of a review.

With regard to sickness benefit, the Solicitor-General submitted that this does not in this case fall to be taken into account. Under section 11 of the National Insurance Act, 1946, sickness benefit is payable in respect of any day of incapacity for work which forms part of a period of interruption of employment. The incapacity may follow upon an injury, but the event that brings the statute into operation is not the injury but the incapacity; sickness benefit can, of course, be payable when there has been no injury at all. The rights are therefore rights whose immediate source is the incapacity, and the question is left open as to whether or not the incapacity is caused by the injury. If it is, then the rights accrue from the injury. If it is not, then they do not. That is a point which the court must itself decide for the purposes of its own determination.

This is the Solicitor-General's submission, and I think it is right. Mr. Chapman submits that in a case like this I ought to have regard to the view of the insurance officer and on that view the sickness was caused by the injury; the sickness benefit was in this case paid as a continuation of the industrial injury benefit and they ought not to be treated differently. Whatever the merits of this latter argument, I think the question must be decided by my view of the meaning of the section. I am bound by the insurance officer's finding in respect of industrial injury benefit, not because I defer to him as a tribunal, but because I have to put a figure on rights for which his valuation is conclusive. In this sense I am bound by any valuation which it is his function to make; but I am not bound by a valuation which I think he might have made if he had applied his mind to facts which it is no part of his duty to consider.

The other point upon which some discussion took place was how the court should evaluate the effect of its own findings upon the plaintiff's further rights under the statute. I have already mentioned some of the difficulties that might arise. Fortunately I have not got to deal with them in this case, and the Solicitor-General prudently confined himself to saying in effect that they would have to be solved when they were encountered.

*Judgment for the plaintiff for £25 general damages only and costs up to the time of payment in of the sum of £25 by the defendants on the county court scale.*

Solicitors: *Shaen, Roscoe & Co.; L. Bingham & Co.; Solicitor, Ministry of Pensions and National Insurance.*

J. A. G.

C. A.

1955
*Oct.* 7, 10.

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Denning,
Hodson and
Morris L.JJ.

# HILLS (PATENTS) LTD. *v.* UNIVERSITY COLLEGE HOSPITAL BOARD OF GOVERNORS.
# SAME *v.* SAME.
# SAME *v.* SAME.
# SAME *v.* SAME.

[Plaints Nos. L. 535, 536, 537, 697.]

*Landlord and Tenant—Act of* 1954*—Application for new lease—Application opposed by landlords on ground that they intend to occupy premises for business to be carried on by them therein—Landlords a hospital board of governors—Premises to be sold with vacant possession to Minister of Health for hospital uses—Whether intended occupation by board as agents of Minister for his business—Status of board affecting nature of occupation—"Business" of board—National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 12 (3), 13 (1), 14*—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (2), 30 (1) (*g*), 57.

*National Health Service—Hospital—Status of hospital board of governors—Whether agents of Minister—National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 12 (3), 13 (1), 14.

*Possession—Land—Agent.*

In 1948 leasehold property tenanted by a business firm near a teaching hospital and purchased by the hospital in 1947 for future hospital uses became vested as endowment property in the board of governors under the National Health Service Act, 1946. In 1954 the board agreed to sell the premises to the Minister of Health when vacant possession had been obtained, in order to use them for hospital purposes. When the leases expired in March, 1955, the business tenants applied under the Landlord and Tenant Act, 1954, for a new tenancy. The board as landlords opposed the application on the ground set out in section 30 (1) (*g*) of the Act of 1954, that "on the termination of the current tenancy "the landlord intends to occupy the holding for the purposes, ". . . of a business to be carried on by him therein . . ." The county court judge refused the application for a new lease. On appeal by the tenants:—

*Held* (Hodson L.J. dissenting), that the board had established the ground of opposition in subsection (*g*), for, though section 12 (3) of the National Health Service Act, 1946, required the board to manage and control the hospital "on behalf of the "Minister," the Act as a whole conferred such ample powers on the board as to give them a status superior to that of an ordinary agent of the Minister, with the result that even after the sale of the premises to the Minister the board would be occupiers of the premises, and would occupy for the purposes of carrying on their activities under the Act, those activities being a "business" as defined by section 23 (2) of the Act of 1954; and that, accordingly, the tenants' right to a new tenancy was effectively barred.

*Per* Denning L.J. It might be that the Minister also would occupy the premises. Possession in law is single and exclusive, but occupation may be shared with others or had on behalf of others.

*Pegler* v. *Craven* [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685 distinguished.

*Per* Hodson L.J. The board, in exercising their powers under the Act of 1946, were not acting as principals, but as agents or representatives of the Minister, such that their intended occupation would be that of the Minister, since there cannot be two occupations; and the activity to be carried on therein was equally that of the Minister and not of the board in their own right. The board accordingly could not establish their right under section 30 (1) (*g*) to prevent the tenants obtaining a new tenancy. To hold otherwise would be inconsistent with the decision in *Pegler* v. *Craven* (supra). A fortiori, where the Minister had power under section 57 of the Act of 1954 to prevent the tenants obtaining a new tenancy on grounds of public interest.

APPEALS from Judge Alun Pugh, sitting at Bloomsbury County Court.

In August, 1947, the authorities who at that date owned University College Hospital bought the reversion of the leases of premises next door to the hospital known as 57 to 67, Chenies Mews. At that date the leases had nearly eight years to run, being due to expire on March 25, 1955. The properties were purchased out of hospital endowment funds, with the object of their being taken into use for hospital purposes when they fell into possession. On July 5, 1948, when the National Health Service Act, 1946,[1] came into operation, the hospital was taken over by the Minister of Health as a teaching hospital, and property then belonging to the governing bodies of voluntary hospitals, designated teaching hospitals, was divided into two parts: (a) property in use for hospital purposes, which vested in the Minister, and (b) other property—"endowment" property—not in use for hospital purposes, which became vested in the board of governors as trustees on trust to use the income for hospital purposes. The properties in question in the present case accordingly vested in the board of governors as an endowment.

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[1] National Health Service Act, 1946, s. 12 (3): "It shall be the "duty of the Board of Governors of "every teaching hospital, as from "the appointed day, in accordance "with regulations and such direc-"tions as may be given by the "Minister, generally to manage and "control the hospital on behalf of the "Minister, and in particular—(*a*) to "provide for the university with "which the hospital is associated such "facilities as appear to the Minister "to be required for clinical teaching "and research; (*b*) to appoint officers "required to be employed at or for "the purposes of the hospital; (*c*) to "maintain any premises forming part "of or used in connexion with the "hospital; (*d*) to acquire on behalf "of the Minister and to maintain "equipment, furniture and other "movable property required for the "purposes of the hospital."

S. 13 (1): ". . . the Board of "Governors of a teaching hospital "shall, notwithstanding that they are "exercising functions on behalf of "the Minister . . . be entitled to "enforce any rights acquired, and "shall be liable in respect of any "liabilities incurred (including liabi-"lities in tort), in the exercise of "those functions, in all respects as "if the Board . . . were acting as "a principal . . ."

In 1954 it was decided that when the leases fell in the property should be taken into use for hospital purposes, among other things, for workshops, a physics laboratory, the engineer's office, and the accounts department of the hospital. Correspondence between the board of governors and the Minister took place in which it was agreed that when the board obtained vacant possession they should sell the premises to the Minister for the sum of £30.000.

When the leases expired in March, 1955, the tenants, Hills (Patents) Ltd., a firm of number-plate manufacturers, applied to the county court under the provisions of the Landlord and Tenant Act, 1954,[2] for a new tenancy. The board as landlords opposed the grant of a new tenancy, stating as follows: "We "intend, on the termination of the current tenancy, to occupy "the premises for the purposes of activities carried on by us

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[2] Landlord and Tenant Act, 1954, s. 23 (2): "In this Part of this "Act the expression 'business' in-"cludes a trade, profession or em-"ployment and includes any activity "carried on by a body of persons, "whether corporate or unincorporate."
S. 30: "(1) The grounds on which "a landlord may oppose an applica-"tion under s. 24 (1) of this Act "are such of the following grounds as "may be stated in the landlord's "notice . . . (*g*) subject as herein-"after provided, that on the termina-"tion of the current tenancy the "landlord intends to occupy the hold-"ing for the purposes, or partly for "the purposes, of a business to be "carried on by him therein, or as "his residence."
S. 57: "(1) Where the interest "of the landlord or any superior "landlord in the property comprised "in any tenancy belongs to or is "held for the purposes of a Govern-"ment department . . . the "Minister or Board in charge of any "Government department may cer-"tify that it is requisite for the pur-"poses of the first-mentioned depart-"ment . . . that the use or occupation "of the property or a part thereof "shall be changed by a specified "date. . . . (5) Where application "is made to the court under Part II "of this Act for the grant of a new "tenancy and the landlord's interest "in the property comprised in the "tenancy belongs or is held as men-"tioned in subsection (1) of this sec-"tion, the Minister or Board in "charge of any Government depart-"ment may certify that it is neces-"sary in the public interest that if "the landlord makes an application "in that behalf the court shall deter-"mine as a term of the new tenancy "that it shall be terminable by six "months' notice to quit given by the "landlord. . . . (6) The foregoing "provisions of this section shall apply "to an interest held by a Board of "Governors . . . constituted under "the National Health Service Act, "1946 . . ."

"(being a body corporate constituted under the National Health "Service Act, 1946)," and relied before the county court on the ground of opposition in section 30 (1) (*g*) of the Act of 1954.[2]

The county court judge on July 4, 1955, dismissed the application for a new tenancy on the ground that on the termination of the current tenancy the landlord (namely, the board) intended to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein.

The tenants appealed.

*Roy Wilson Q.C.* and *Adrian Hamilton* for the tenants. Though the Minister of Health has power under section 57 of the Landlord and Tenant Act, 1954, to prevent the tenants from obtaining a new lease on grounds of public interest, he has not elected to use that power, and the tenants are therefore automatically entitled under the scheme of Part II of the Act to a new lease unless the landlords terminate the tenancy by a statutory notice and establish one of the seven grounds of opposition set out in section 30 (1). The sole issue is whether the board of governors as landlords have established the ground of opposition in paragraph (*g*) of section 30 (1), namely, whether they have proved that on the termination of the current tenancy they intend to occupy the holding for the purposes of a business to be carried on by them therein. It is conceded that on the definition of "business" in section 23 (2) the activities of running a hospital are a business. But the facts show that the board have agreed to sell the premises to the Minister when they obtain possession of them and that they are to be used for hospital purposes.

It is submitted, first, that from the date of sale of the premises to the Minister the intended occupation of the board will necessarily subsist only by virtue of the Minister's title and not by virtue of their own. Section 30 (1) (*g*) does not contemplate, and should not be construed as governing, an occupation of that kind. As a matter of legal principle, the present case is no different from one in which a landlord resists an application for a new tenancy on the ground that he wants to occupy, then sells the premises to, say, a chain store, is appointed as manager of the business of the chain store, and then, by virtue of a licence derived from the chain store company, says that *he* is occupying for the purposes of *his* business. But the landlord's interest, as the definition of "landlord" in section 44 (1) shows, is that of holder of the reversion expectant on the lease; and paragraph (*g*) is intended to give a continuing right of occupation to someone who is going to occupy by virtue of that reversion falling in. If the board's construction is accepted, the provision in section 30 (2) which requires a landlord to have held the property for five years before he can resist an application for a new lease under subsection (1) (*g*) could be circumvented, and it would lead to many abuses of an Act which is intended to give protection to tenants of business premises.

Secondly, it is submitted that after the sale there can be no occupation by the board but only by the Minister, for there is no distinction in law between the functions of a board of governors of a hospital and those of the Minister under the provisions of the National Health Service Act, 1946. The board are the agents of the Minister, for the words in section 12 (3) of the Act of 1946 conferring on the board the functions of "managing and controlling the hospital" are "on behalf of the Minister." Those are well-established words of agency. Though section 13 gives the board the right to sue and be sued in their own name, that does not confer on the board any special status or right independent of the Minister, for section 13, it is submitted, was put in as mere machinery for the enforcement of rights and liabilities by and against the Crown.

[MORRIS L.J. But if the board as landlords are entitled to enforce the right of occupation, might they not be the occupiers?]

No; for their status as agents is not affected by the provision that notices can be served on them and actions taken against them. Many managers and agents of limited companies are given very wide powers.

Thirdly, even if the board could be said as managers of the hospital to occupy the premises in some special sense, the true purpose of such occupation would not be the exercise of their own activities as managers, but the exercise of the Minister's functions in accordance with section 6 of the Act of 1946, namely, "carrying on the business of the hospital." One does not occupy to manage, but to carry on a business. Management is not an end in itself but a means to an end.

The decision in *Pegler* v. *Craven* [3] is strong support for all the above submissions. There the tenant had, under the transitional Leasehold Property (Temporary Provisions) Act, 1951, to show that he was the occupier of shop premises. He had sold the business to a company consisting of members of his family and himself; but the court said, rightly, it is submitted, that the tenant in those circumstances was carrying on someone else's business and that that someone else (the company) was the occupier; and he was accordingly not entitled to a new lease: see *per* Jenkins L.J. on "occupation." [4]

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[3] [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685.

[DENNING L.J. The issue here depends on an interpretation of the Act of 1946, and whether in view of the words "on behalf "of the Minister" it is the Minister or the board which is carrying on the undertaking. It may be that the board, in view of their functions, are in a position superior to other agents.]

Nothing in the Act of 1946—except section 13 which, as already submitted, is purely procedural—distinguishes the degree of authority given to the board from that given to other bodies which, on the authorities on agency, have been held to be agents.

Finally, it is submitted that the notice served by the board was defective. Section 25 (6) of the Act of 1954 requires that the grounds of opposition shall be set out fully and not merely inferred. This notice stated only that the premises were required for hospital purposes.

[HODSON L.J. It would be unfortunate if this case had to be decided against the board on that very technical point.]

*Tristram Beresford Q.C.* and *J. D. F. Moylan* for the board. There was ample evidence before the county court judge on which he could find, as he did, that the board had established their ground of opposition. The board is a large body of distinguished persons who are not paid for their work. They occupy the hospital and see that its activities are carried out. They are given rights which no ordinary agent has ever been given. They produce accounts, and are responsible for anything that goes wrong. On the evidence before the court, they occupy the hospital. *Pegler's* case [5] is distinguishable, for there the tenant had parted with possession to a nominal company and occupied as manager. Here the hospital has been taken over under the Act of 1946, and though the board is nominally under the direction of the Minister, that is only because the Minister must obtain moneys from Parliament, and therefore matters have to be arranged in this way. The conception of the Act is that the Minister is to have final control; but that does not affect the question whether or not the board are occupying merely as his agents or are in an entirely superior position.

An ordinary manager could not be sued, though he might be made a second defendant; but under section 13 it is the board

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[4] [1952] 2 Q.B. 69, 74, 76.

[5] [1952] 2 Q.B. 69.

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which must be sued. They are the principals and not mere agents. They are the only persons who could get rid of a tenant under section 30 (1). They are appointed by independent bodies, and it is doubtful whether the Minister has any power to interfere with what they do. He may give directions, but it is the board which must carry out the tasks of managing and controlling the hospital.

*Wilson Q.C.* in reply. The board have not been taken over by the Minister under the Act of 1946, but are a statutory body, and their rights are neither more nor less than the specific rights given to them under the Act. If the Minister is displeased with the board he may dismiss them: see section 57. In relation to their management functions under section 12 (3) and also under the regulations made thereunder (the National Health Service (Functions of Regional Hospital Boards, etc.), Regulations, 1948 (S.I. 1948, No. 60)), they have to obey any direction given by the Minister. Though section 14 (1) provides that "all officers "employed for the purposes of any hospital . . . shall be officers "of the board of governors . . ." that does not affect the position that the board themselves have been defined in section 12 (3) as acting solely "on behalf of the Minister." Their position is no different from that of an agent of a limited company, for a company could provide by its articles that its agents shall be entitled to enter into contracts in their own name for the employment of servants.

If it is held that the board are the real occupiers, what is to be the position in those cases where the Minister himself has granted leases of redundant hospital property direct to tenants? Though that may be a hypothetical case for the present purposes, the position will be that if the Minister sought under section 30 (1) of the Act of 1954 to resist new tenancies, the tenants could tell him that this court has decided that the board are the occupiers and that he cannot rely on paragraph (*g*). There cannot be two occupiers of the same undivided property: see *per* Vaughan Williams J. in *In re Smith, Ex parte Mason.*[6]

DENNING L.J. In August, 1947, the authorities who then owned University College Hospital bought the reversion of the lease of premises next door to the hospital known as 57 to 67, Chenies Mews. The lease then had nearly eight years to run, being due to expire on March 25, 1955. The object with which the hospital authorities bought those buildings was to take them into use for hospital purposes when they fell into possession. But in the intervening time between 1947, when they bought the premises, and 1955, when the lease fell in, two Acts of Parliament have been passed which have much affected the position.

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[6] [1893] 1 Q.B. 323, 326.

In 1948 the hospital was taken over as a teaching hospital by the Minister of Health under the National Health Service Act, 1946. The result was that the property which was then in use for hospital purposes became vested in the Minister. He did not run the hospital himself, but a board of governors ran it for him. The other property, namely, investments and property not in use for hospital purposes, became vested in the board of governors as trustees on trust to use the income for hospital purposes. In 1948 these particular premises in Chenies Mews were not in use for hospital purposes. They were an investment, and they became vested in the board of governors as an endowment.

In 1954, by the Landlord and Tenant Act, 1954, tenants of business premises were given an automatic extension of their leases, unless on particular grounds the landlords could refuse it. These particular premises in Chenies Mews were occupied by tenants of the name of Hills (Patents) Ltd. for business purposes; and, therefore, when their lease came to an end in March, 1955, there was an automatic extension of the lease.

The board of governors as landlords, however, resist any further extension. They have given the necessary statutory notices and rely on section 30 (1) (*g*) of the Act of 1954, which says that the landlord may oppose a new lease on the ground that "the landlord intends to occupy the holding for the pur- "poses, or partly for the purposes, of a business to be carried "on by him therein . . ." The governors say that they want possession of these premises in Chenies Mews because they intend to occupy them for hospital purposes which they intend to carry on on the premises. The tenants say that the governors cannot bring themselves within that subsection, because it is not the governors who intended to occupy these premises, but the Minister of Health.

The intentions of the governors and the Minister are plain. The Minister has agreed to purchase from the governors the freehold interest in these premises for a sum of £30,000. The intention is that the Minister should own the premises, but that the governors should run them for hospital purposes, just as they run the rest of the hospital. We are told that the premises are very urgently needed for these purposes of the hospital.

The sole question in the case is whether in these circumstances the governors intend to occupy these premises for the purposes of a business to be carried on by them. This depends on the relationship of the governors to the Minister under the National Health Service Act, 1946. The material sections for present purposes are sections 12, 13 and 14. Under the Act it is plain that the board of governors are entrusted with the task of managing and controlling the hospital "on behalf of" the Minister, and in accordance with regulations and such directions as may be given by the Minister. Mr. Wilson says that the governors, when they use these premises for hospital purposes, will be acting only on behalf of the Minister. They will be his agents. He will occupy it by them. It will be his business and his activity, and that therefore it is quite impossible for the governors to say that they intend to occupy it for the purpose of a business to be carried on by them.

Mr. Wilson referred us, in support of his argument, to *Pegler* v. *Craven*,[1] and he took the illustration of a man who owned a shop. Could it be argued, said Mr. Wilson, that the owner of that shop could resist an application for a new lease, on the ground that he intended to occupy it as manager of a chain store to which he wished to sell it? Mr. Wilson would have us treat this as a parallel case and say that the governors are but agents for the Minister, and cannot resist a new lease, seeing that they require it, not for themselves, but for the Minister.

I cannot accept this argument, because, in my opinion, the board of governors of a teaching hospital are in a position far superior to that of an ordinary agent. They are a body corporate and are entrusted with the task of managing the hospital and of running it themselves. The Minister himself cannot take that task out of their hands. He is not allowed by the Act of Parliament to run the hospital himself. The board of governors are the people to do it. Furthermore, they appoint the officers and staff of the hospital, and under the wording of the Act of Parliament those officers then become the officers of the board of governors, not the officers of the Minister. The governors are, of course, accountable to the Minister for the way in which they carry out their task, and he can give directions to them in much the same way, I suppose, as the Minister of Transport can give directions to the British Transport Commission. But as I read this Act of Parliament, the Minister must leave the actual running of the hospital to the governors themselves.

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[1] [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685.

Mr. Wilson says that the Minister will occupy the premises. That may be true, but I think that the board of governors will occupy them also. Possession in law is, of course, single and exclusive; but occupation may be shared with others or had on behalf of others. I think that the board of governors are in such a responsible position in regard to this hospital that they are occupiers. It has been held in an old case that the master of a ship has himself possession such that he in his own name can bring an action of trespass as upon his own possession: see *Moore* v. *Robinson*.[2] I rank the occupation of these governors at least as high as that of the master of a ship. I feel no doubt that the governors are in occupation of the existing hospital premises, and that they intend to occupy these additional premises if they can get possession of them.

Mr. Wilson then raised a second point: Not only must the governors intend to occupy the premises, but they have to do so for the purpose of a business to be carried on by them therein. On this point Morris L.J. drew attention to the definition of "business" in section 23 (2) of the Act of 1954, which provides: " . . . the expression 'business' includes a trade, profession or "employment and includes any activity carried on by a body of "persons, whether corporate or unincorporate." Reading those words into the section it seems to me plain that the governors intend to occupy these premises for the purposes of an activity to be carried on by them therein. Their activity is managing this hospital, and they intend, if they get these premises, to occupy them for the purpose of that activity. It is difficult to think of a parallel case. One that occurs to me, though it is not an exact analogy, is that of a building owner who employs a contractor to build a house. It is quite a proper use of language to say that the contractor is building the house "on behalf of" the owner, but equally it is quite proper to say that the contractor "occupies" the site, and that the contractor is carrying on his activity of building on the site.

The last point taken by Mr. Wilson was that the right remedy of the governors was under section 57 of the Act of 1954 which, he said, applied exactly to this case. He asked the rhetorical question: If the governors can say that they intend to occupy the premises for the purposes of their activity, what is to be the position if the Minister grants a lease and, when it comes to an end, he wants to resist a new lease? To that argument I would say, first, that that is a hypothetical case which is not the one before us. But, next, I would suggest that in such a case the Minister himself might well be held to intend to occupy the premises for the purposes of an activity to be carried on by him therein, namely, his activity of providing hospital accommodation.

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[2] (1831) 2 B. & Ad. 817.

In the result, therefore, I find myself in agreement with the decision of the county court judge. These premises were bought originally by the hospital authorities with a view to using them for hospital purposes. In spite of the various statutory changes in between it appears to me that the governors, now that the lease has come to an end, do require the premises for hospital activities to be carried on by them therein, and that this appeal should accordingly be dismissed.

Hodson L.J. My view of the matter is that the judgment of the county court judge cannot be sustained. It is obvious that the premises in question are sorely needed for the hospital. They were acquired with the idea that when the leases expired they should be used for an extension of the hospital premises, and that is the very laudable object of the board of governors who are the respondents to this appeal. The question is a narrow one: Have the right steps been taken by anyone to prevent these tenants from getting a new lease? Though I have struggled during the course of this case to do so, I have been unable to see the answer to the tenant's argument.

It was pointed out that, since the National Health Service Act, 1946, the function of providing hospital services is in the Minister of Health; and the Minister has power under section 57 of the Landlord and Tenant Act, 1954, to step in and prevent a new lease being granted where premises were required for hospital purposes. He did not do that. What has happened is that the tenants have applied for a new lease, as they were entitled to do under the Act of 1954, which provides that in the circumstances they shall have a new lease unless the landlords can bring themselves within certain heads of objection.

The first point taken on behalf of the appellants is that the form of the notice was insufficient; but I think it is enough to say that, in my judgment, the form of the notice given in this case by the landlords was apt to draw the attention of the tenants and of the court to the specific ground on which the landlords relied. That is section 30 (1) (*g*), which reads as follows: "subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

The position here is that the board of governors of University College Hospital have agreed to sell the property to the Minister for a named sum. As I understand the matter, the intention is not that the board of governors shall occupy the premises for the purposes, or partly for the purposes, of the business to be carried on by them therein, but the intention is that the Minister is to occupy the premises for the purposes of the business to be carried on by him therein. Section 23 (2) of the same Act gives an extended meaning to the word "business" so as to include "any activity carried on by a body of persons, whether corporate or unincorporate."

It has been argued here on behalf of the landlords that it is they who are seeking to carry on the business, they who are intending to occupy the premises, and that, therefore, they fall within the four corners of this subsection. I have been unable to see the way out of the difficulty presented by sections 12 and 13 of the National Health Service Act, 1946. Section 12 (3) sets out in detail the functions of boards of governors: "It shall be the duty of the board of governors of every teaching hospital, as from the appointed day, in accordance with regulations and such directions as may be given by the Minister, generally to manage and control the hospital on behalf of the Minister." Particular examples are given showing the very extensive powers of the board acting nevertheless on behalf of the Minister. Perhaps the strongest illustration of the extensive nature of those powers was pointed out by Morris L.J. in the course of the argument: section 12 (3) (*b*), "to appoint officers required to be employed at or for the purposes of the hospital." Section 14 shows, in regard to the conditions of service and appointment of officers, that they are to be treated as servants of the board—that is to say, they are not the servants of the Minister, but the servants of the Board—and that is said to be inconsistent with the position of the board as merely occupying the position of an agent acting on behalf of the Minister, as that kind of language is ordinarily used. Nevertheless the board always acts on behalf of the Minister under this section.

Furthermore, in section 13 it is provided that the board of governors of a teaching hospital—that is this case—"shall, notwithstanding that they are exercising functions on behalf "of the Minister . . . be entitled to enforce any rights acquired, "and shall be liable in respect of any liabilities incurred "(including liabilities in tort), in the exercise of those functions, "in all respects as if the board . . . were acting as a principal." That language again, I think, supports the view that the board of governors are not, in exercising their powers under this statute —extensive and important powers though they are—acting as principals; otherwise it would not be said that they were to act as if they were principals; and I for my part am unable to see in what respect they are other than agents of the Minister; and if they are merely the agents of the Minister, the occupation is the occupation of the Minister, and not the occupation of the board of governors. As I see it, there cannot be two occupations. Similarly, the business or activity, to use the word introduced by the earlier section, is the activity of the Minister, and not the activity of the board of governors in their own right. They are merely the representatives of the Minister. That position seems to be quite intelligible when one appreciates that there is an agreement to sell the property to the Minister. The property will be in the Minister's name, and he will be in a position in those circumstances, when he gets the property, to lease it to other persons if he finds that it is not needed for the purposes of the hospital.

There is, I think, a real dilemma here if one visualizes a case in which the Minister might seek to rely on section 30 (1) (*g*) as the occupier of the land. Faced by the decision of this court, it might be argued that this court has already held that the board of governors were the occupiers, and I find difficulty in fitting the two entities—the Minister on the one hand and the board of governors on the other—into such a scheme.

In conclusion, I may add that the view which I have expressed seems to be consistent with the view expressed by this court in a somewhat similar case under another Act, namely, *Pegler* v. *Craven*,[3] a case which was concerned with the occupation of a shop under the Leasehold Property (Temporary Provisions) Act, 1951. Applying the reasoning of that case to this case—the judgment I have particularly in mind is that of Jenkins L.J.[4]— it seems to me that there is an analogy which appears to make the decision of this court in the present case difficult to reconcile with the view taken by the court in *Pegler* v. *Craven*.[4]

Therefore, although I say it with regret—because I think the result would be an unfortunate one—if the matter had rested with me I should have felt bound to allow the appeal.

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[3] [1952] 2 Q.B. 69.

[4] Ibid. 72–8.

MORRIS L.J. In the written document which was prepared by the board of governors of the hospital in answer to the application of the tenants for a new tenancy, they said as follows: "We intend, on the termination of the current tenancy, "to occupy the premises for the purposes of activities carried on "by us (being a body corporate constituted under the National "Health Service Act, 1946)." That was their answer dated May, 1955. The governors had, of course, made their intention known long before. Indeed, in April, 1952, there had been a suggestion that the lease might be renewed, and a reply was sent on behalf of the board of governors dated April 30, 1952, which said: "I regret to have to inform you that it will not be "possible for your clients to renew their lease when it expires in "March, 1955, as my board have plans for using these premises "for hospital purposes."

The wording employed by the board of governors in the answer presented by them to the application for a new tenancy has reference to the language of section 30 (1) (*g*), together with the definition of the word "business" that is contained in section 23. At first sight it would seem that if the governors of a hospital want to use premises, which they own, for hospital purposes, the wording of section 30 (1) (*g*) is satisfied. But the matter is, of course, by no means as simple as that. The governors own the premises in their capacity as trustees of the endowments of a hospital which has been designated as a teaching hospital. Section 7 (1) of the National Health Service Act, 1946, reads as follows: "Where any voluntary hospital to which "the last foregoing section applies is, before the appointed day, "designated by the Minister under this Part of this Act as a "teaching hospital or is one of a group of hospitals so designated, "all endowments of the hospitals held immediately before the "appointed day shall on that day, by virtue of this Act, be "transferred to and vest in the board of governors constituted "under the following provisions of this Part of this Act for the "teaching hospital." Subsection (2) reads: "All such endowments shall vest in the board free of any trust existing "immediately before the appointed day and shall be held by the "board on trust for such purposes relating to hospital services "or to the functions of the board under this Part of this Act "with respect to research as the board think fit, and the board "may dispose of any property comprised in those endowments "and hold the proceeds thereof on trust for any of the said "purposes."

If the board of governors get possession of their property, they propose to sell it to the Minister of Health for a sum of £30,000. That £30,000 will then form part of their endowments. Thereafter, in their capacity as managers and controllers of the hospital, they propose to convert the premises for use as part of the hospital—not, as I follow it, for the actual reception of patients, but for use as a works department and in other ways. Some part or parts of the main hospital building (as appears from the correspondence before us) is or are at present used by the works department, and such part or parts will, if the plans are carried out, become available for direct hospital services. In the proposed new premises there will be, among other things, workshops, a physics laboratory, the engineer's office and the accounts department of the hospital. The board of governors will, on behalf of the Minister, have to spend a considerable sum of money (estimated at £15,000) in making the alterations. The Minister appears to have approved of the plans, for indeed he has said in a letter of February 12, 1955: "The Minister wishes to "be informed when the property has been brought into use for "hospital purposes, and if it is not fully used by April 1, 1956, "he should be notified of the circumstances."

The duties of the board of governors of a teaching hospital are laid down in section 12 (3) of the Act of 1946. If the board of governors get possession, and if the plans that are projected are carried out, the question in the first place will be whether the board would be occupying, and in the second place, whether they would be occupying for the purposes of, or partly for the purposes of, a business to be carried on by them therein. The definition of "business" is, I think, very important. The words of section 23 (2) of the Landlord and Tenant Act, 1954, are: "In this Part of this Act the expression 'business' includes a "trade, profession or employment and includes any activity "carried on by a body of persons, whether corporate or "unincorporate."

Mr. Wilson submits that the board of governors—if the plans proposed are carried out—would not be in occupation; and further that even if, in those events, the board could be said, as managers, in some sense to "occupy," the true purpose of their occupation would not be the exercise of their own functions, but the exercise of the Minister's functions under section 3 of the

Act of 1946, and that the board of governors would be occupying the hospital for those purposes. Section 3 of the Act of 1946 refers to the provision of services by the Minister. It is sufficient to read the opening words: "As from the appointed "day, it shall be the duty of the Minister to provide throughout "England and Wales, to such extent as he considers necessary "to meet all reasonable requirements, accommodation and "services of the following descriptions, that is to say," firstly, hospital accommodation, then medical, nursing and other services required at or for the purposes of hospitals, and thirdly, services of specialists, the whole being referred to as "hospital and "specialist services."

It seems to me reasonable to regard the duties of the board of governors which are defined by section 12 (3) of the Act of 1946 as comprising their activities. The question under section 30 (1) (*g*) of the Landlord and Tenant Act, 1954, as applied to this case can therefore, it appears to me, be posed as follows: Do the board of governors intend to occupy the premises for the purposes, or partly for the purposes, of generally managing and controlling University College Hospital, and for the purposes of maintaining the premises as part of or to be used in connexion with that hospital, or for the purposes of acquiring on behalf of the Minister equipment, furniture and other movable property required for the purposes of the hospital? The further question arises whether they propose to carry on those purposes or activities in the premises.

As regards the purposes which I have mentioned, it appears to me to be beyond question that they are the purposes of the governors. It is, of course, true that everything is done on behalf of the Minister, but the governors, in the course of their duties of generally managing, controlling and maintaining the hospital, require to have these premises. The premises are to form a part of or to be used in connexion with the hospital. The works department is a necessary part of the hospital; so is the accounts department.

The next question, I think, is whether the governors intend to carry on their activities or to carry out their purposes "in" the premises. One of their statutory duties is to maintain any premises forming part of or used in connexion with the hospital. It is desired to use these premises in connexion with the hospital or as part of the hospital. The activity of maintaining and of equipping and providing these premises seems to be something which will be carried on in the premises. It is, in my view, rather artificial to regard the activities and functions of the board of governors as being by way of remote control, and as not to be carried on in the premises.

The last question, therefore, is whether the board of governors will be in occupation. It is said that it is the Minister who will be in occupation, and that the board of governors will be merely his agents, and *Pegler* v. *Craven* [5] is referred to. The position of the board of governors in the present case seems, however, to be entirely different from that of an agent for a limited company. Though the governors are subject to the directions of the Minister, they have a very special position. The decision in this case really depends on its own facts, and on an examination of the position and functions of a board of governors as prescribed under the Act of 1946. They manage and control the hospital. They maintain it. They do all the providing. They appoint officers and servants who may be their officers and servants. They are a body corporate. Their status, and the amplitude of the delegation to them are such that I think it can properly be said that they can be regarded as occupiers of the hospital. Their occupation is necessary for the discharge of their duties of maintaining, controlling, managing, equipping, providing and running the hospital. For these reasons, therefore, I consider that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Underwood & Co.; Pennington & Son.*

M. M. H.

[5] [1952] 2 Q.B. 69.

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*Oct.* 5, 6.

Denning, Hodson and Morris L.JJ.

## MORCOM *v.* CAMPBELL-JOHNSON AND OTHERS.

[18/1955.]

*Landlord and Tenant — Rent restriction — Standard rent — Increase— "Improvement" — Old drainage and cold-water systems replaced by new—Defective area level adjoining building lowered—Whether "improvement" or "repair"—Test applicable—Improvement from tenant's point of view—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*a*)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *Sch. I.*

*Fact or Law.*

The landlords of a 60-year-old block of flats incurred expenditure of some £10,000 on replacing the original old and worn water-borne drainage and cold-water systems by more efficient modern equivalents, and on lowering the area adjacent to the building which had been defective from its origin. On their application to the court for declarations that they were entitled to increase the standard rent of the tenants by an apportioned amount of eight per cent. of the sum expended, as "expenditure on the improvement . . . of "the dwelling-house (not including expenditure on . . . repairs)" within section 2 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended:—

*Held*, that an "improvement of the dwelling-house" within section 2 (1) (*a*) meant the provision of something new which was beneficial, judged objectively from the point of view of the reasonable tenant; that (i) the replacement of the old drainage and cold-water systems by their modern equivalents, although resulting in making the dwelling-house better than it was before, were not such improvements but repairs only; and (ii) lowering the area, though an improvement per se, was not, in the circumstances, an improvement of any dwelling-house or flat; and that the landlords accordingly were not entitled to increase the rent under the section.

*Semble, per* Denning and Hodson L.JJ., that expenditure on works, albeit executed off the site of a particular dwelling-house, might constitute an "improvement of the dwelling-house" such as to qualify the landlord to increase the rent under section 2 (1) (*a*) and to apportion the permitted proportion of the cost among the tenants so benefited, despite the absence of any provision for apportionment in the relevant Rent Acts.

*Wates* v. *Rowland* [1952] 2 Q.B. 12; [1952] 1 T.L.R. 488; [1952] 1 All E.R. 470 applied.

Dicta of Fletcher Moulton and Buckley L.JJ. on "repairs" in *Lurcott* v. *Wakely and Wheeler* [1911] 1 K.B. 905 considered.

CONSOLIDATED APPEALS from Judge Dale, sitting at Westminster County Court.

The governors of Grey Coat Hospital, as landlords of a block of 48 rent-controlled flats on six floors, built in 1896, at Grey Coat Gardens, Westminster, expended in 1952 and 1953 some £25,000 on works, part of which sum was for repairs which qualified them to increase the rents of the flats to the full extent permitted under the Housing Repairs and Rent Act, 1954. In addition to that increase they applied to the county court under section 11 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1923, for the determination of the question whether they were also entitled to the increases of rent given by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (*a*), as amended.[1] They claimed in particular that three items of work done at a cost of some £10,000 were "improvements of the "dwelling-house" within the meaning of the section, as follows:

(1) The drainage system: When the flats were put up in 1896 they had water-closets, the refuse from which was taken down one set of pipes into drains below the ground; and alongside were wash-hand basins and baths, from which a separate set of pipes went down the house; but when they went underground the water was carried into the same drains as the refuse from the water-closets, the system being known as the two-pipe system. In the course of time it was found that that system was not the best that could be devised, and that it was better to have a system whereby everything—refuse and water—from water-closets, wash-hand basins and baths was all taken down by one set of pipes. This was called the one-pipe system. After 60 years the two-pipe system had come to the end of its life, and the landlords were faced with the question whether to repair all that system piece by piece or whether to put in a modern one-pipe system. The landlords, having taken advice, were told that the better and cheaper way of making good the drainage system at the present day was to instal a one-pipe system, the system which the by-laws of the London County Council required for any new dwellings. They installed that system, at a cost of £5,200. (2) The cold water supply to the flats: When the flats were built, each flat had had its own storage cistern of 80 gallons in the flat. But in the course of time, troubles arose. Some of the tenants, for instance, had put taps on the rising mains; and the pipes were worn out. That system, too, had come to the end of its life. The landlords took advice and decided that the best way to make the system good was that, instead of having 80-gallon tanks, one in each flat, there should be a 480-gallon tank in the top of the building which would supply six flats. That was done at a cost of £4,600. (3) The lowering of the area in the middle of or adjacent to the flats: The trouble there was of long standing. When the area was first made, it was an inch or so higher than

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (as amended by the Rent and Mortgage Interest Restrictions Act, 1939): "The amount by which the "increased rent of a dwelling-house "to which this Act applies may "exceed the standard rent shall, sub-"ject to the provisions of this Act, "be as follows, that is to say:—(a) "Where the landlord has since Sep-"tember 2, 1939, incurred, or here-"after incurs, expenditure on the "improvement or structural alteration "of the dwelling-house (not including "expenditure on decoration or repairs), "an amount calculated at a rate "per annum not exceeding . . . "eight per cent. of the amount so "expended. . . ."

the damp course, with the result that if water collected in the area it might percolate into the walls above the damp course and so might rise up the walls and cause dry rot. That was a defect in the work which had been done when the flats were originally built. It was decided, when all the work of repairs was being done, that the area should be lowered an inch or two so as to bring it below the damp course. The cost of that work was £690.

On the applications by the landlords to the county court the tenants contended that the drainage and cold-water system were "repairs" and not "improvements" and that, accordingly, the landlords were not entitled to the increase of rent claimed. On the lowering of the area, while conceding that that might be an "improvement," they contended that it was not an improvement "*of* the dwelling-house" within the section because it was work done off the premises.

On May 23, 1955, the county court judge held that the works were "improvements." He expressed the view that the case would undoubtedly go to the Court of Appeal but that his findings of fact would not affect the argument in that court. Without deciding whether the section required that "improvement of the "dwelling-house" within section 2 (1) (*a*) must be work done "on" the premises or might be done off the premises if it related to the premises, he held that the improvements in question were done substantially on the premises and sufficiently near each flat to be of benefit to the particular flat or "dwelling-house."

On the main question whether the works were repairs or improvements, the county court judge took as the definition of improvement that stated by successful counsel in *Wates* v. *Rowland* [2] and recited though not adopted by Jenkins L.J. in his judgment, namely,[3] work "which does not merely restore the "premises to a condition approximating to the condition that "they were in when new, but does make the premises in some "way better in kind than they ever were before"; and he held on the basis of that definition that the degree of benefit was such that the works were improvements within the definition cited and within section 2 (1) (*a*). He apportioned the increase of 8 per cent. on the sum of £10,000 claimed by the landlords between the tenants on the basis of the rateable value of each flat; and made a declaration that the landlords were entitled under section 11 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1923, to increase the rents payable by the tenants beyond the standard rents by an apportioned amount of 8 per cent. of a sum to be agreed between the parties, or, in default of agreement, ascertained in such manner as the court might direct.

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[2] [1952] 2 Q.B. 12; [1952] 1 T.L.R. 488; [1952] 1 All E.R. 470.

[3] [1952] 2 Q.B. 12, 17.

The tenants appealed.

*R. E. Megarry* and *John Silberrad* for the tenants. It is submitted, first, that the drainage and cold-water systems were "repairs" and not "improvements" since they were merely modern equivalents of what was there before. Any repair must involve an element of improvement, but the test whether something is an improvement is: "Does it provide something new "that is different in kind from what was there before?"; for example, the replacement of an earth-closet by a water-closet, as in *Strood Estates Ltd.* v. *Gregory*[4] and *Rabbitt* v. *Grant*.[5] (Although the reports of the former case do not explicitly disclose the nature of the work done, the case went to the House of Lords on another point, and the county court judge's notes of evidence in the printed case make it clear that an earth-closet was replaced by a water-closet and a mere stand-pipe by a proper sink.) The test stated above was that applied to the different works considered in *Wates* v. *Rowland*.[6]

In the present case the county court judge applied the wrong test, namely, that what was provided was better in kind than what was there before, and he erred in that because he cited from the judgment of Jenkins L.J. in *Wates* v. *Rowland*[7] the Lord Justice's summary of the argument of successful counsel instead of applying the test which Jenkins L.J. himself formulated.[8]

Secondly, it is submitted that mere replacement of a subsidiary part of a building is a repair and not an improvement. The unit for consideration is the building as a whole, or here the particular flat as a whole, and not the whole drainage or cold-water system. There is no authority binding on this court as to the meaning of "repair" in section 2 (1) (*a*), and little or nothing turns on the repeal by the Housing Repairs and Rents Act, 1954, s. 54 (4), Sch. V, of the definition of "repairs" in section 2 (5) of the Act of 1920; but guidance is obtainable from the common law cases on the construction of repairing covenants. The essence of the decision in *Lurcott* v. *Wakely and Wheeler*[9] is that "repair" is a word which involves and is capable of involving the complete renewal of subsidiary parts of a building as a whole: see *per* Fletcher Moulton and Buckley L.JJ.[10] If citation of a reported county court decision is permissible, in *Garstang* v. *Fish*[11] the county court judge took the dwelling-house as the unit and held that the replacement of a smaller for a larger water pipe and the provision of a separate water supply to a house was restoration and not "improvement."

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[4] [1936] 2 K.B. 605; 52 T.L.R. 553; [1936] 2 All E.R. 355.

[5] [1940] I.R. 323.

[6] [1952] 2 Q.B. 12.

[7] Ibid. 17.

[8] Ibid. 20–1.

[9] [1911] 1 K.B. 905.

[DENNING L.J. We do not want to add to the series of reports that may be cited. It will be preferable to tell the court the facts of the case.]

This court has permitted such reports to be cited: see *Rogers* v. *Hyde*.[12]

In *Jones & Co.* v. *Inland Revenue Commissioners*[13] the court considered "repair" and "improvement" for the purposes of the Income Tax Act, 1918, and held that the replacement of something which was part of an entirety, albeit effected in a different place, was a "repair." The question is: what is the entirety?

[DENNING L.J. And where the entirety is a block of flats, the drainage system is a subsidiary part of the entirety?]

Yes. It is submitted, thirdly, that in determining whether something is an "improvement" under section 2 (1) (*a*), the point of view for consideration is that of the reasonable tenant. Though the decision in *Lambert* v. *Woolworth & Co. Ltd.*[14] is not directly helpful, since it was on the different statutory language of the Landlord and Tenant Act, 1927, it assists in showing that to interpret the meaning of the uncertain word "improvement" one must look at the statutory words and also at the consequences. Here the consequences to the tenant may be an increase in rent, and accordingly an "improvement" must be something of benefit to him. Nothing which makes the management of the property easier or cheaper for the landlord, or which makes the property more saleable, can rank as an "improvement" within the section unless it confers a real benefit on the tenant. The landlord ought not to be able to increase the rent merely because he has, for example, installed a hot-water economizer, or apparatus to switch off the lights on a common staircase, or a composition floor in the common passage to save wear and tear on his carpets. Here, there is no functional difference so far as the tenants are concerned; their water flows in and their waste flows out just as before.

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[10] [1911] 1 K.B. 919, 924.

[11] [1934] L.J.N.C.C.R. 274.

[12] [1951] 2 K.B. 923, 926, 931; [1951] 2 All E.R. 79.

[13] 1952 S.C. 94.

[14] [1938] Ch. 883; 54 T.L.R. 806; [1938] 2 All E.R. 664.

Fourthly, it is submitted that though the lowering of the area in the present case was an improvement, it was not an "improvement *of* the dwelling-house." Section 2 (1) (*a*) does not contemplate anything being charged as an improvement except that which is physically done on the demised premises. The language of the section is "improvement or structural alteration "of the dwelling-house." Clearly a "structural alteration" must be on the dwelling-house; and similarly an "improvement" which is outside the four walls of the dwelling-house (such as the removal of an unsightly neighbouring building, or pointing a wall facing the house) cannot be an "improvement of the dwelling-"house" qualifying the landlord to increase the rent. This is a fortiori, as the Act of 1920, unlike the Housing Repairs and Rents Act, 1954, Sch. II, para. 7, makes no provision for apportionment of the cost of an improvement off the site of the dwelling-house; and in the absence of statutory provisions there is no satisfactory machinery for such apportionment, particularly where there has been considerable variation in the work done in respect of each flat. The power to apportion road-making charges mentioned by the county court judge is nihil ad rem, for this is authorized by express statutory provision, e.g., the Private Street Works Act, 1892, ss. 6, 10. Nor are the apportionment provisions in section 12 (3) of the Act of 1920 in point. If this view is wrong, then, as one county court judge has pointed out (*Jones* v. *Cooper*[15]), the landlord could make an increase against each tenant of eight per cent. of the entire cost of some communal improvement and so recover many times over. Further, it would be difficult to fix limits to the range of "improvement" under this section unless it is confined to work done "on" the dwelling-house.

The county court judge found the primary facts, and the incorrect inferences which he drew are such, it is submitted, that this court can, in accordance with the principles laid down by the House of Lords in *Edwards* (*Inspector of Taxes*) v. *Bairstow*,[16] draw the right inferences on the same facts.

*H. Heathcote-Williams Q.C.* and *Stanley Rees* for the landlords. The question whether the works in question were repairs or improvements within section 2 (1) (*a*) is a question of degree and therefore of fact. It is not enough to say that they were merely modern equivalents of what was there before. The landlords had three alternatives: (*a*) to patch up; (*b*) to carry out extensive adjustments of the existing systems; (*c*) to instal entirely new systems. They elected to do (*c*) and the degree was such as to make them improvements.

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[15] [1942] L.J.N.C.C.R. 240, 245.

[16] [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

If it is a question of principle and not of fact, the test applied by the county court judge was correct, namely, whether in the result the premises were better in kind than they were before. That was the test applied in *Wates* v. *Rowland* [17] when the case is read as a whole. *Lurcott* v. *Wakely and Wheeler* [18] is distinguishable, for there the court was considering, not the operation to be performed but the state to be achieved, in order to comply with covenants for repairs. The case does not assist in the construction of the word "repairs" simpliciter or the word as used in the Rent Acts. The landlords here have put in an improved system for the drainage and cold water—a better system, which is of supreme benefit to the tenants and to their health. A landlord is not to be prohibited from making a charge for putting in an improved system merely because a tenant says that he does not want it. *Jones & Co.* v. *Inland Revenue Commissioners* [19] does not assist the contention for the tenants, for it was there decided as a fact that the new chimney was not an improvement on the old.

Secondly, on the test as to what is the entirety, the unit for consideration is the drainage system, but the improvement of the drainage system constituted an improvement, not of the drainage system per se, but of the entirety of the dwelling-house.

Thirdly, decisions under the Landlord and Tenant Act, 1927, that an "improvement" under that Act must be an improvement from the tenants' point of view, do not assist in the present case under the Rent Acts. The test here as to whether something is "improvement" or not is a socially objective test, namely, whether what is done improves the standard of the dwelling-house. The point of view of the reasonable tenant would not suffice unless the reasonable tenant is also a socially conscious tenant.

Fourthly, on the question whether charges under section 2 (1) (*a*) are confined to improvements done actually *on* the site of the dwelling-house, it is not correct to seek support from the provisions in the Housing Repairs and Rents Act, 1954, and to submit that, because the new Act makes specific provision for apportionment where work is done off the premises, it must be inferred that the absence of similar provisions in the Act of 1920 means that no improvement *off* the premises is chargeable to the tenants under that Act. In construing an Act of Parliament it is necessary to look at the realities. A landlord who brings a water supply to a row of cottages must lay pipes outside the house. It would be nonsense to say that he can charge under section 2 (1) (*a*) only for the lengths of pipes laid inside the four walls. *Stockham* v. *Easton*[20] is of persuasive authority on this point. The absence of provisions for apportionment in the Act does not present any real difficulty, for it is within the power of the court or a tribunal to make just apportionments. It is done every day by rent tribunals and valuers. [*Bell Property Trust Ltd.* v. *Hampstead Assessment Committee*[21] was also referred to.]

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[17] [1952] 2 Q.B. 12.
[18] [1911] 1 K.B. 905.
[19] 1952 S.C. 94.

*Megarry* replied.

DENNING L.J. stated the facts, read section 2 (1) of the Act of 1920 as amended, and continued: The question for our determination is whether three items of work come within the description " improvement of the dwelling-house "—that is, of the flat—" (not including expenditure on decoration or repairs)."

[His Lordship stated the particulars of the three works done, as set out in the statement of facts above, and continued:] The county court judge, in a careful judgment, has said that the primary facts are undisputed. He held that all these three works were improvements and qualified the landlords for an increase. I think that his decision necessarily involved the true construction of this statute; and that is a point of law which this court is in a position to review.

I find great difficulty in framing a definition of what is an " improvement " as distinct from a " repair." Perhaps the most helpful way is to give a few illustrations. In *Strood Estates Ltd.* v. *Gregory*[1] there was an old-fashioned privy at the bottom of a garden which was simply a pit which was emptied every month or so by the local authority. The landlords removed that old-fashioned privy, and substituted a modern water closet in which the refuse was taken away by a water-borne system. That was, no doubt, an improvement. In *Wates* v. *Rowland*[2] the floor of a house had become rotten by damp. When the floor was made good, instead of putting in a wooden floor, a tiled floor was put in. That was held not to be an "improvement" but a "repair." But in the self-same case a new concrete bed, some nine inches in depth, was put into the house because the water level in the area had risen. That was held to be an "improvement." Jenkins L.J. said [3]: "The replacement of a floor of some kind "would, I think, therefore fairly come within the description "of 'repairs'"—and he held that the tiled floor replacing the old wooden floor was repairs. Evershed M.R. said [4]: "In the "course of the argument examples were given showing that what "was undoubtedly repair might yet involve some degree of "improvement, in the sense of the modern substitute being "better than that which had gone before."

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[20] [1924] 1 K.B. 52; 39 T.L.R. 472.

[21] [1940] 2 K.B. 543; 57 T.L.R. 10; [1940] 3 All E.R. 640.

[1] [1936] 2 K.B. 605; 52 T.L.R. 553; [1936] 2 All E.R. 354.

[2] [1952] 2 Q.B. 12.

It seems to me that the test, so far as one can give any test in these matters, is this: if the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement; but if it is only the replacement of something already there, which has become dilapidated or worn out, then, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not improvements.

Applying this test, it seems to me that the drainage system in these flats is the same now as the system which existed before. All that has happened is that, instead of there being two pipes to carry the water and refuse away, there is one pipe. That is simply the replacement of the older two-pipes system by its modern equivalent of one pipe. It comes, I think, properly within the category of repairs and not that of improvement. So, also, with the cold-water system. There were six individual tanks before, one in each flat. Those have been replaced by one bulk storage tank in the roof of the block. That, again, is simply the replacement of something which existed before by a more suitable modern substitute. In both cases, as the surveyor said, it was a cheaper way of doing it than it would have been simply to restore the old system as it was. It seems to me that in both those instances the work done properly comes within the category of repairs and not that of improvements.

It is material to notice that, so far as the tenants are concerned, the position in the flats from the practical point of view is no different from what it was before. The water-closets, the baths and the cold-water system all operate just as they did before. If anything, some of the tenants said that it was a little more inconvenient, because, for instance, the baths were higher.

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[3] [1952] 2 Q.B. 12, 21.

[4] Ibid. 23.

In a sense, of course, the work benefits them in the same way as any repairs must benefit the people who live in a house, because, when it gets old and dilapidated, they are better off when it is repaired and made good. But that is the extent of the benefit to them. There is no provision of anything new for their benefit, but only the replacement of the old parts by a modern equivalent, and, in my judgment, that does not amount to improvement so as to qualify the landlords for an increase in rent.

There remains the third item, which, I confess, has given me much difficulty. That is the lowering of this area. Mr. Megarry submitted to us that on the strict and true construction of this statute, an improvement has to be executed on the site of the flat itself—on the dwelling-house itself. I am not prepared today to go as far as that. I can well see that there is much force in what Mr. Heathcote-Williams contended, that if, for instance, a landlord brings a water supply or an electricity supply into a row of houses, the whole of that expenditure would qualify for an increase. The expenditure on the common pipe which led up to the house would have to be apportioned among the individual houses, even though the expenditure was common to all. The same would apply if a new lift were put into a block of flats instead of an old staircase. I do not myself wish to exclude in such a case the possibility of the landlord qualifying for an appropriate increase. I would not be deterred from so holding by the fact that the statute makes no express provision for apportionment. I think the courts have enough resources open to them to solve questions of that kind. But, nevertheless, when I come to consider this particular expenditure—lowering an area to make good a defect which had been there from the commencement; just making good a defect—and when I consider the evidence in the case, it seems to me difficult to say that this is expenditure on the improvement of the flats or on any individual flat. I do not think that even that item qualifies the landlord for an increase. In those circumstances, in my judgment, the appeal should be allowed and judgment entered for the tenants.

HODSON L.J. I agree. [His Lordship stated the facts, read section 2 (1), and continued:] The question for consideration on this appeal is whether the £10,000 which is the figure with which we are concerned is money spent on improvement, or whether it is excluded by the words in brackets in section 2 (1) (*a*), which lay down that that is not to include expenditure on decorations or repairs.

The county court judge, in considering first the question of the drainage, sought to be guided by what was said by this court in *Wates* v. *Rowland*,[5] in which this court had to consider a section with which we are not confronted. The county court judge, in reading that case, as his judgment shows, cited the argument of counsel as stated by Jenkins L.J. rather than the expressions of Jenkins L.J., which he made his own in the concluding part of his judgment, so that the county court judge was more concerned to consider whether or not what had been done with regard to this drainage was something better than what had been there before than whether it was something which satisfied the conception of improvement—an improvement going beyond repair. I think, when one considers this somewhat troublesome question, that it is obvious that all repairs, if well done, will, in the majority of cases, involve some improvement, particularly in the case of old property where modern methods have been introduced—modern systems of plumbing, improved systems of drainage, and so forth—where it would be foolish to replace them in their ancient condition in order to carry out the repair. In his judgment, Jenkins L.J., considering the facts of that case (to which my Lord has referred), stated[6]: "The "landlord has incurred expenditure, and I think he has certainly "incurred expenditure on a structural alteration, that is to say, "the addition of the further nine inches of concrete. He has "also incurred expenditure on what is prima facie, according to "the ordinary meaning of the word, an 'improvement,' for on "the evidence he has made the house, as regards its substratum, "and the system of construction of the floor and its foundations, "very much better than they ever were before. Is there, then, "any sufficient reason for holding that this expenditure is to be "excluded from consideration on the ground that it was expenditure on repairs? In my judgment the answer to that question "is: up to a point this work, the totality of the work done, was "work of repair. The tenant had a floor in the house when he "went in, and clearly the house could not be said to be in good "tenantable repair after the floor had become rotten. The "replacement of a floor of some kind would, I think, therefore "fairly come within the description of 'repairs.' It would be "making good a defect arising from the action of the water "underneath the floor which had caused the floor to rot, and to "that extent, therefore, the expenditure in my view could not "properly rank for the 8 per cent. increase, and it is not

[5] [1952] 2 Q.B. 12.

[6] Ibid. 20–1.

"contended that it should so rank. But the landlord did substantially more, in my view, than merely provide a new floor. "He did make a structural alteration and an improvement, "consisting of the laying of the additional concrete bed over "the existing concrete, and that provided the house with a "better substratum than it had ever had before, in the shape "of a solid concrete bed on to which the new floor could be laid "direct, thus getting rid of the disadvantage under which the "house had laboured from the time it was built, consisting of the "cavity beneath the floor, into which, under the changed conditions brought about by the rise in water level, water could "find its way." Accordingly, Jenkins L.J., in a judgment with which the other members of the court concurred, held that the expenditure, consisting of a structural alteration in the shape of the concrete work, should be considered as expenditure on improvement, and not be excluded from consideration as being an expenditure on repairs.

That is a clear illustration of the way the court has dealt with this question. I think it is clear that what one has to look at is whether there has been the provision of something new rather than the replacement of what was there before. In *Wates'* case [7] there was considered the Irish case of *Rabbitt* v. *Grant*,[8] and also the earlier case in this court of *Strood Estates Ltd.* v. *Gregory*,[9] to which reference has already been made. Those cases concerned premises where there had been earth-closets, and where the earth-closets had been taken away and the pits used with them had been filled in, and in their place had been put water-borne drainage. It was thought in *Wates* v. *Rowland* [10] and the earlier case of *Strood*,[11] that that class of case was rightly regarded as a case of an improvement and not of a mere repair. But the substitution of one water-borne form of drainage for another seems to me to be an entirely different thing, which comes under the heading of repair. In my judgment, guidance is to be obtained from the case concerning covenants to repair—*Lurcott* v. *Wakely and Wheeler*.[12] In that case there were three covenants: a covenant to keep in good condition, a covenant to keep in thorough repair, and a third covenant to repair. Fletcher Moulton L.J.'s observations on that are, I think, relevant. When he came to the third covenant to repair, he said[13]: "Here there is a duty to perform an "operation. No doubt, if you thoroughly repair, it will put the "house in a good condition and in a state of thorough repair. "But it is plain that the word 'repair' refers to the operation "to which the defendants bind themselves to have recourse. For "my own part, when the word 'repair' is applied to a complex "matter like a house, I have no doubt that the repair includes "the replacement of parts. Of course, if a house had tumbled "down, or was down, the word 'repair' could not be used to "cover rebuilding. It would not be apt to describe such an "operation. But, so long as the house exists as a structure, the "question whether repair means replacement, or, to use the "phrase so common in marine cases, substituting new for old, "does not seem to me to be at all material. Many, and in fact "most, repairs imply that some portion of the total fabric is "renewed, that new is put in place of old. Therefore you have "from time to time as things need repair to put new for old." At the beginning of Buckley L.J.'s judgment there is the following passage[14]: "'Repair' and 'renew' are not words expressive "of a clear contrast. Repair always involves renewal; renewal "of a part; of a subordinate part"—I am leaving out the next few lines—"Repair is restoration by renewal or replacement of "subsidiary parts of a whole. Renewal, as distinguished from "repair, is reconstruction of the entirety, meaning by the "entirety not necessarily the whole but substantially the whole "subject-matter under discussion." I think that, even though, as Mr. Heathcote-Williams said, that was a case dealing with the covenant to repair, and must not be taken as necessarily being the last word on what can be said about repairs under the Rent Restriction Acts, nevertheless it is a guide as to what has to be taken to be a repair.

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[7] [1952] 2 Q.B. 12, 19.
[8] [1940] I.R. 323.
[9] [1936] 2 K.B. 605.
[10] [1952] 2 Q.B. 12.
[11] [1936] 2 K.B. 605.
[12] [1911] 1 K.B. 905.

Taking the premises as a whole, this change-over from the old system of water-borne drainage to the new was, in my judgment, quite clearly a repair, and there is no room for any other conclusion on the construction of this Act.

This is not a case where the primary facts are in dispute. The facts, which have been summarized by my Lord, are agreed substantially between the parties. There is no dispute as to what was done. Distinguished surveyors were acting on behalf of the landlords, and what they have done, no doubt, was well done and done on the best possible advice. There is no doubt about the facts, nor, indeed, is there, I think, any question on any inference of fact which the judge drew. He drew no inference of fact. The only question is whether the facts which have been agreed in this case amount to improvement or whether they are confined by the more limited word "repair." I think, so far as the drains are concerned (which is the matter which has occupied the greater time in argument in this court), the answer is that they come within the heading of repair.

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[13] [1911] 1 K.B. 905, 918–9.

[14] Ibid. 923–4.

So far as the water is concerned, the change-over of the water system again was a necessary repair, and I think nothing was done which can take the case out of the class of repair into the class of improvement.

I should have said earlier that it seems to me to be plain that, in considering whether or not anything is an improvement, it must be looked at from the point of view of the reasonable tenant objectively, because, looking at the scope of the Act and of this particular section, one sees that it is a section which provides for the landlord obtaining an increase of rent from a tenant—8 per cent. on the amount expended. It seems to me to follow from that that the question whether or not there is an improvement on which a charge can properly be made ought to be looked at from the point of view of the proposed or existing tenant of the dwelling-house in question.

The third head of charge, work in lowering the surrounding area, has given me, too, considerable difficulty, because, clearly, that was an improvement, and indeed it has not been otherwise contended. The only question is whether it is an improvement "of the dwelling-house." To revert to the language of the section, the expenditure has to be on "the improvement or "structural alteration of the dwelling-house." If structural alteration is considered, and one asks: "What has to be struc-"turally altered?", the answer must be: "The dwelling-house "itself." The question is whether the word "improvement" is also limited to the dwelling-house itself. I think that it must be conceded that there may be works carried on away from premises which could be regarded as improvements of the dwelling-house. But the question in this case is whether there is any evidence which can justify the conclusion that the lowering of this area, which was outside the body of the flats, was an improvement of any of these dwelling-houses which constitute the parts of this block of flats. I think it is sufficient for the purposes of this appeal to say that I am not satisfied on the evidence that there is any such material on which the court can so hold. Therefore, I think that the appeal must be allowed in toto, and that the landlords have failed to qualify under section 2 of the Act of 1920.

MORRIS L.J. I am of the same opinion. The words with which we are here concerned in this appeal are "expenditure "on the improvement or structural alterations of the dwelling-"house (not including expenditure on decoration or repairs)." We have not been concerned in this appeal with any question under the proviso to section 2 (1) (*a*). It is clear, I think, that repair may involve, and often does involve, some measure of improvement. Certain passages from *Lurcott* v. *Wakely and Wheeler*[15] bear that out. Fletcher Moulton L.J. said[16]: "Many, and in fact most, repairs imply that some portion "of the total fabric is renewed, that new is put in place "of old." Buckley L.J. said[17]: "Repair is restoration by "renewal or replacement of subsidiary parts of a whole." Some measure of improvement may be involved in work of repair. In *Wates* v. *Rowland*[18] Jenkins L.J. said[19]: "Turning again to "the facts of the present case in their relation to the relevant "statutory provisions, there is no doubt that the landlord has "incurred expenditure, and I think he has certainly incurred "expenditure on a structural alteration, that is to say, the "addition of the further nine inches of concrete. He has also "incurred expenditure on what is prima facie, according to the "ordinary meaning of the word, an 'improvement,' for on the "evidence he has made the house, as regards its substratum, "and the system of construction of the floor and its foundations, "very much better than they ever were before." He went on: "Is there, then, any sufficient reason for holding that this "expenditure is to be excluded from consideration on the ground "that it was expenditure on repairs?" That approach, I think, follows the wording of the section, namely, the words: "Expenditure on the improvement of the dwelling-house (not including "expenditure on decoration or repairs)." *Wates* v. *Rowland*,[19] by its facts, affords a very helpful and useful illustration of what may be regarded as repair and what may be regarded as improvement. Jenkins L.J. said[20]: "The replacement of a floor of some "kind would, I think, therefore fairly come within the description of 'repairs.'" Later on he said[20]: "But the landlord "did substantially more, in my view, than merely provide a new

[15] [1911] 1 K.B. 905.
[16] Ibid. 919.
[17] Ibid. 924.
[18] [1952] 2 Q.B. 12.
[19] Ibid. 20.
[20] Ibid. 21.

"floor. He did make a structural alteration and an improvement, consisting of the laying of the additional concrete bed "over the existing concrete, and that provided the house with a "better substratum than it had ever had before, in the shape of "a solid concrete bed onto which the new floor could be laid "direct, thus getting rid of the disadvantage under which the "house had laboured from the time it was built, consisting of "the cavity beneath the floor, into which, under the changed "conditions brought about by the rise in water level, water could "find its way."

An argument was submitted to us in regard to the question whether the wording now in question should be approached from the point of view of the landlord or the tenant. Should improvement be considered from the point of view of the tenant? It is quite clear that the matter cannot be determined by considering what any particular tenant thinks. If the view of a tenant is being considered, it must be the view of a reasonable tenant. But it seems to me that the real inquiry must always be one to ascertain the true facts as to whether or not there has been an "improvement." Though Jenkins L.J. used the words "very "much better" in the passage that I have quoted, he also used the words "according to the ordinary meaning of the word." Expenditure must be shown which is expenditure on improvement or structural alteration not including expenditure on decoration or repairs.

It has, of course, always to be borne in mind that the very purpose of a dwelling-house is that it should be lived in, and if, under the machinery of this section, a tenant may be called upon to pay more, then it is natural to suppose that he will have to pay more because he is getting something which is an improvement of the dwelling-house in which he is to live, which, I think, contemplates an improvement that will be an improvement from his point of view. But the word is "improvement," which is the word to which attention must always be directed on the facts of a particular case.

It would seem, on first approach, as though in a matter of this kind any decision would be a decision of fact which would not be the subject of appeal. But it is clear from the judgment of the county court judge that he regarded the essential facts as not in dispute, and he considered—and I think he was right in so considering—that we would be in as good a position as he was to arrive at a conclusion. I do not at this stage refer more fully to the facts, but I think reference can usefully be made to the document mentioned by the judge in his judgment, which was the report of November 2, 1954, from the surveyors. The surveyors gave evidence, and we have been referred to their evidence. But this document, I think, was taken by the judge as conveniently summarizing the position. In reference to the sanitary system the following is stated: "The sanitary inspector would not have "allowed us to repair the system in the form in which it was "in 1952 and it was considered to be more satisfactory and "economical to instal a 'one-pipe' system in lieu of the conventional old and insanitary 'two-pipe' system. In the new "system the whole of the soil and waste branches in each half "block of six flats discharge into a single pipe directly connected "to the drain, with anti-siphonage pipes connected to the "individual fittings," and so on. Then further on, in reference to the water system, is this passage: "The services as they "stood in 1952 consisted, in each half block of six flats, of a "rising main from ground level to the roof space feeding, in most "flats, a large cold-water supply tank and, in some cases, the "flushing tanks, lavatory basins, sinks and baths. In many "cases, however, alterations had been made over the years and "the fittings were served direct from the rising main, in itself "a contravention of the by-laws. Most of the cold-water storage "tanks in the individual flats were either rotted or unused, and "the rising mains themselves were found to be defective. We "were of the opinion, therefore, that the repair of the rising "mains would be costly and that the additional load which would "be placed on them by the modernization of the system as a "whole would impose such a strain that there might be danger "of failure within a short time." The passage which follows is also important, but I do not now pause to read it. It seems to me that this report, which is really in conformity with the evidence of the surveyors, rather demonstrates that what happened was that repairs were necessary, that some work had to be done, and that opportunity was taken to do the work in the most modern way. It may also be that there was some anticipation of repairs which, it was thought, would have to be done in a short time, and that it was thought to be more economical and in accordance with good estate management to do everything at the one time.

It seems to me that what ultimately has to be decided is whether the work comes within the category referred to by Evershed M.R. in *Wates* v. *Rowland* when he said[21]: "In the

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[21] [1952] 2 Q.B. 12, 23.

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Morris L.J.

"course of the argument examples were given showing that what "was undoubtedly repair might yet involve some degree of "improvement, in the sense of the modern substitute being "better than that which had gone before." A consideration of the evidence leads me to the view that here it was in substance work of repair that was being done, although that repair involved some degree of improvement and although the modern substitute might be better than that which had gone before. I think, therefore, that we are obliged to differ from the judgment of the judge.

*Appeal allowed.*
*Declaration set aside and application below dismissed.*
*Leave to appeal to the House of Lords refused.*

Solicitors: *Baylis, Pearce & Co.; Trollope & Winckworth.*

M. M. H.

1955
*Oct.* 21.

Pearce, Barry and Glyn-Jones JJ.

## PETERBOROUGH CORPORATION *v.* HOLDICH AND ANOTHER.

*Public Health — Refuse removal — Dustbins — Notice requiring house-owner to provide dustbin—House occupied by tenant—Owner's appeal to justices—Duty of justices to direct owner or occupier to comply with notice—Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 75 (1), (3)—*Local Government (Miscellaneous Provisions) Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 26), *s.* 8 (4) (*b*).

A house owner on whom a notice had been served under section 75 (1) of the Public Health Act, 1936,[1] requiring him to provide a proper dustbin for a house occupied by his tenant, appealed under

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[1] Public Health Act, 1936, s. 75 (1): "A local authority who, as "respects their district or any part "thereof, have undertaken the removal "of house refuse may by notice "require the owner or occupier of "any building within the district, or, "as the case may be, within that "part of the district, to provide such "number of covered dustbins for the "reception of house refuse of such "material, size and construction as "the authority may approve:

"Provided that this subsection "shall not entitle an authority to "require the replacement of any dust-"bin in use . . . so long as it is of "suitable material, size and construc-"tion . . . and in proper condition.

"Any person aggrieved by a "requirement of the local authority "under this subsection may appeal to "a court of summary jurisdiction. . . .

"(3) A local authority may, as "respects their district or any part "thereof, in lieu of requiring the section 8 (4) of the Local Government (Miscellaneous Provisions) Act, 1953,[2] to a court of summary jurisdiction on the ground that it was not equitable that the notice should have been served on him, and in compliance with that subsection served notice of his appeal on the occupier. The justices allowed the owner's appeal, but, although they found that the existing dustbin was defective, they refused to make an order against the occupier, who was also before the court:—

*Held*, that section 75 (3) of the Act of 1936 gave a local authority the right to supply dustbins to a district or a particular part of a district, but not to supply a dustbin to an individual house, and, as regards the latter, it was the duty of justices under section 8 (4) (*b*) of the Act of 1953, once it was established that no adequate dustbin had been provided, to decide as between the owner and occupier who was the person who should bear the burden of providing one, and to make an order directing one or other of them to comply with the notice.

*Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow* [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78 distinguished.

CASE STATED by Peterborough justices.

On March 17, 1955, the first respondent, Frederick White Holdich, appealed by way of complaint to justices as a party aggrieved against a notice served on him on behalf of the appellant authority, the Peterborough Corporation, pursuant to section 75 (1) of the Public Health Act, 1936, requiring him as the owner of a dwelling-house known as 151, Aldermans' Drive,

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"owners or occupiers of buildings to "provide and maintain dustbins for "the reception of house refuse, under-"take themselves to provide and "maintain such dustbins as may be "necessary and, so long as such an "undertaking is in force, the autho-"rity may make in respect of each "dustbin provided by them such "annual charge not exceeding five "shillings as they think proper.

"Any such charge . . . may be "recovered as part of the general "rate in respect of the premises for "which the dustbin has been pro-"vided, but without prejudice to the "rights of any person under any "tenancy agreement."

[2] Local Government (Miscellaneous Provisions) Act, 1953, s. 8 (4): "Where an appeal is brought under "section 75 (1) [of the Public Health "Act, 1936] in respect of a notice "requiring one of two persons who "are respectively the owner and the "occupier of a building to provide a "dustbin, and the grounds upon "which the appeal is brought include "the ground that it was not equit-"able that the notice should have "been served on the appellant—(*a*) "the appellant shall serve a copy of "his notice of appeal on the other of "the two said persons; and (*b*) on "the hearing of the appeal the court "may make such order as it thinks "fit with respect to compliance with "the first-mentioned notice either by "the appellant or by the said other "person; and in exercising its "powers under this subsection the "court shall have regard, as between "an owner and an occupier, to the "terms and conditions, whether con-"tractual or statutory, of the tenancy "of the premises concerned."

Peterborough, to provide a dustbin complying with the requirements therein specified. His ground of appeal to the justices was that it was not equitable that the notice should have been served upon him, and he duly served a copy of his notice of appeal upon William Coates, the second respondent, as occupier of the dwelling-house, so complying with section 8 (4) (*a*) of the Local Government (Miscellaneous Provisions) Act, 1953.

The justices heard the complaint on April 15, 1955, and found the following facts: The local authority had undertaken the removal of house refuse within the district which included the dwelling-house in question. On February 28, 1955, the authority had caused to be served upon the first respondent the notice which required him to provide a dustbin of such size and construction that it could be removed conveniently and without any leakage, spilling or absorption of its contents. At all material times the first respondent was the owner and the second respondent the occupier of the dwelling-house under a weekly tenancy at a weekly rent of 5s. 10½d., the tenant paying rates. The terms and conditions of the tenancy did not require either the landlord or tenant to provide a dustbin, but prior to the service of the notice on the first respondent dustbins had been supplied on occasion by him or his predecessors in title and on occasion by the occupier, the tenant. The dustbin actually in use when the notice was served was defective and there was no suitable or adequate dustbin or other receptacle in use at the dwelling-house for the reception of household refuse.

It was contended on behalf of the local authority that in view of the evidence adduced before them the justices were required to make an order in respect of the compliance with the statutory notice either by the owner or the occupier of the dwelling-house, and that, if they were of the opinion that it was not equitable that the notice should have been served upon the owner thereof, it was their duty to make an order requiring the occupier to comply with it.

It was contended on behalf of the owner that it was not equitable that the notice should have been served on him, and it was contended by the occupier in person that it would be inequitable for him to be required to provide a dustbin.

The justices were of opinion (a) that it was not equitable that the notice should have been served on the owner of the dwelling-house; (b) that section 8 (4) of the Local Government (Miscellaneous Provisions) Act, 1953, was permissive, and that, having refused to make an order in respect of the owner, they were not bound in the particular circumstances to make an order in respect of the occupier. Accordingly, they allowed the owner's appeal and declined to make an order upon the occupier.

The local authority appealed.

*E. Dennis Smith* for the local authority. It was the duty of the justices, in the circumstances of the present case, to make an order against either the owner or the occupier. Section 75 (3) of the Public Health Act, 1936, which enables the local authority itself, if it so desires, to supply dustbins "as respects their "district or any part thereof" and to charge the expense to the general rate is inappropriate to the case of an individual dwelling-house. Even if it were appropriate, the local authority has in the present case chosen to proceed under section 75 (1), and this administrative decision cannot be questioned. Further, it was not contended before the justices that the local authority should supply a dustbin. In *Croydon Corporation* v. *Thomas* [3] the court held that, although the provisions of section 290 of the Act of 1936 did not apply to the case of an appeal under section 75, the justices had an unfettered discretion, provided that they acted judicially, and that as regards the person before them they were entitled to consider the equities as between owner and occupier.

[BARRY J. referred to *First National Housing Trust Ltd.* v. *Chesterfield Rural District Council.*[4]]

Both that case and *Croydon Corporation* v. *Thomas* [5] were decided before the passing of the Local Government (Miscellaneous Provisions) Act, 1953. Section 8 (4) of that Act entitles the justices to consider the equities as between owner and occupier, and they can now make an order against a person not served with the notice where the appellant includes as a ground of his appeal that it was not equitable that he should have been served with a notice. It is not disputed that in such a case the justices have a discretion; that discretion must, however, be exercised judicially. It is implicit in the terms of section 8 (4) of the Act of 1953 that where the justices are concerned only with the equities between owner and occupier they must decide which of them should comply with the notice.

*Patrick Fitzgerald* for the justices. The words of section 8 (4) (*b*) of the Local Government (Miscellaneous Provisions) Act, 1953, should be given their literal meaning, and the literal meaning of "may" imports a discretion. Before the Act of 1953 was passed, when justices were inquiring whether the notice ought to have been served on the owner or the occupier, there was no machinery, in the event of their allowing an appeal by one party, whereby they could order that the notice ought to be complied with by the other party. In enacting section 8 (4) Parliament must have had in mind not only the fact that as matters then stood the local authority was faced with the inconvenience of having to go back and serve the other party with a notice, but also that similar difficulty would arise if justices, being empowered to make an order that the other party should comply with the notice, refused to make such an order. If Parliament had intended to avoid that difficulty by depriving justices of any discretion, section 8 (4) (*b*) could easily have been phrased so as to achieve that effect; but it provides that on the hearing of an appeal by the party on whom the notice has been served the court of summary jurisdiction "may make such order as it thinks fit." Those words are permissive and not compulsive, and justices are entitled to allow or dismiss the appeal or to refuse to make any order against either party. Moreover, the local authority can, under section 75 (3) of the Public Health Act, 1936, provide dustbins within its district, and an individual house can be part of a district: see *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow*, *per* Parker J.[6] Throughout the Local Government (Miscellaneous Provisions) Act, 1953, the draftsman has been careful in his use of the words "may" and "must." If it was the intention of the legislature that justices "must" make an order, then the word "may" would not have been used in section 8 (4) (*b*).

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[3] [1947] K.B. 386; [1947] 1 All E.R. 239.

[4] [1948] 2 K.B. 351; 64 T.L.R. 503; [1948] 2 All E.R. 658.

[5] [1947] K.B. 386.

PEARCE J. read section 75 (1) and (3) of the Public Health Act, 1936, and section 8 (4) of the Local Government (Miscellaneous Provisions) Act, 1953, stated the facts, and continued: It was argued on behalf of the local authority that although section 8 (4) of the Act of 1953 in terms states that the justices "may" make an order, in fact, in the particular circumstances of the present case it was necessary for them, in a proper use of their judicial discretion, to make an order on either the owner or the occupier.

At first it seemed to me that since the pattern of section 75 of the Public Health Act, 1936, provided that the local authority could themselves supply dustbins, the justices, when considering as between the owner and the occupier whether they should make an order on one or the other, were not bound to make an order on either. For there was always the possibility envisaged by the section that the local authority could provide the dustbin themselves and charge it in the rate. But a further consideration of section 75 (3) seems to show that that subsection was not intended to give local authorities a right or impose on them a duty to supply dustbins for particular houses. The words are "the local "authority may as regards their district or any part thereof." In my view the subsection was only intended to give them a right to deal with a district or a particular part of a district and not to supply a dustbin to an individual house.

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[6] [1952] 2 Q.B. 601, 605; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78.

Mr. Fitzgerald pointed out that in *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow*,[1] where this court was considering a slightly different application of section 75 (1), Parker J. used these words[2]: "Accordingly, once the court of summary juris- "diction in the present case had declared null and void the "notice and requirement to the applicant, as agent for the "owners, to provide a dustbin, the council would have to fulfil "its duties in some other way. It would either have to provide "a dustbin itself or serve a notice on the occupier requiring "him to do so with the risk of being taken by the occupier to "the court, and having to incur, and possibly to pay, costs." I think it is apparent from that case that Parker J. was not considering the exact wording of section 75 (3), and was not deciding whether that subsection did in fact give the local authority power or impose on it a duty to provide a dustbin for an individual house rather than dustbins for a district or some part thereof.

It is also argued that in the Act of 1953 there are various places where the word "shall" is used as opposed to the word "may." In section 8 (4), as it is at present drafted, it would be impossible for the word "shall" to be used, since there might be cases in which the court found that there was nothing wrong with the dustbin. Although it would have been possible to draft the subsection so that the word "shall" could be appropriately inserted, I do not think that a fair inference to be drawn from the use of the word "may" as opposed to the word "shall" is that there may be no burden on either the occupier or the owner once it is established that a dustbin must be provided. In my view, the justices are deciding as between the occupier and the owner who is the person who shall most equitably bear the burden of providing a dustbin. In this particular case they have found that it was inequitable that the owner should provide it. They have not in terms found that it was inequitable that the occupier should provide it. It is, however, a fair implication that considerations of equity made them reluctant to make an order at all.

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[1] [1952] 2 Q.B. 601.

[2] Ibid. 605.

I have come to the conclusion that on a proper reading of this section, once it has been proved that there is no adequate dustbin, when both the owner and the occupier are before the court, the court has a duty to make an order against one or the other of them. Therefore, the case must go back to the justices with that direction.

BARRY J. I agree. In my judgment, the fundamental consideration in the present case is that under section 75 (1) of the Public Health Act, 1936, Parliament has seen fit to provide that local authorities who have undertaken the removal of house refuse within their district may require the owners or occupiers of premises within that district to provide dustbins for the reception of house refuse. I respectfully agree with what has fallen from my Lord as to the true construction of subsection (3) of that section. If, contrary to my view, it were possible for a local authority to deal with an individual house under the provisions of that subsection, this would not entitle the justices to refuse to make any order under subsection (1) in cases where the local authority have reached the decision to proceed under that subsection. In my judgment, they are to exercise their discretion judicially when parties are before them under the provisions of section 8 (4) of the Local Government (Miscellaneous Provisions) Act, 1953, and the only question before the court is whether it is equitable to serve the notice requiring the provision of a dustbin upon the owner or the occupier. The justices must, under section 8 (4), reach a decision on that point and, having done so, they must require either the owner or the occupier to provide the dustbin. They have, of course, other matters to consider in appeals under the section. Questions may arise as to the suitability of existing dustbins, and as to the propriety of requiring either the owner or the occupier to provide an alternative receptacle. If, however, the only issue is whether the notice should be served on the owner or on the occupier, I am quite satisfied that in the judicial exercise of their discretion the justices must reach a decision on that point and make an order that one or other of those two parties shall comply with the requirements of the local authority. As Pearce J. has said, no real significance can be attached to the use of the word "may" in section 8 (4) (*b*) of the Act of 1953. Indeed, it is to be observed that a similar use of the word is made in section 290 of the Public Health Act, 1936, which is concerned with the apportionment of the expense of complying with various orders made by the local authority between owners and occupiers.

GLYN-JONES J. I agree. Mr. Fitzgerald in his argument sought to persuade us that section 8 (4) (*b*) of the Act of 1953 should be given the meaning which it would have had if it had read as follows: "The court may make such order as it thinks "fit as to whether the notice should be complied with by the "landlord or by the tenant or at all." At first, I was inclined to think, when I read the language of the subsection and nothing else, that that might be its meaning, that is to say, that it might have been intended to confer a complete discretion on the justices, but I am now satisfied that that is the wrong view, and that the proper view is as stated in the judgments which have been delivered.

*Appeal allowed; case remitted.*

Solicitors: *Sharpe, Pritchard & Co. for C. P. Clarke, Peterborough; Bridges, Sawtell & Co. for Percival & Son, Peterborough.*

E. M. W.

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## UPSONS LTD. *v.* E. ROBINS LTD.

[Plaint No. L. 149.]

C. A.
1955
*Oct.* 18.
Denning, Hodson and Morris L.JJ.

*Landlord and Tenant—Act of* 1954—*Application for a new lease—Landlords unable to establish as of right any ground for opposing grant of new tenancy—Duration of new tenancy determined by court—Court's discretion to order grant of "such a tenancy as "may be determined by the court to be reasonable in all the "circumstances"—Whether court precluded from considering "in "all the circumstances" such grounds of opposition as landlords fail to establish as of right—Court's discretion unfettered—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (2), 31, 33.

Section 33 of the Landlord and Tenant Act, 1954, provides that "Where on an application under this Part of this Act the court "makes an order for the grant of a new tenancy, the new tenancy

"... shall be such a tenancy as may be determined by the court "to be reasonable in all the circumstances . . ."

A large company, the tenants of shop premises, applied to the county court under the Act of 1954 for the grant of a new 14-year tenancy on the expiry of their current tenancy. The landlords, who had only one shop, which there was a real risk they might have to leave, had purchased the premises in question in November, 1950, intending to occupy them on the termination of the current tenancy for the purposes of carrying on their own business therein. They were unable to establish any right to oppose the grant of a new tenancy under section 30 (1) (*g*) on the ground that they intended to occupy the premises for the purposes of their own business, because the period during which they had been the landlords was two months short of the five-year period required by section 30 (2). The county court judge, exercising his discretion under section 33 in determining the new tenancy, had regard, inter alia, to those circumstances, and granted the tenants a new tenancy for one year only. On appeal by the tenants:—

*Held*, that the words "in all the circumstances" in section 33 conferred a discretion wide enough to entitle the court to take into consideration all such grounds of opposition as the landlords had failed to establish as of right under sections 30 and 31 of the Act; and that the circumstances considered by the county court judge (including greater hardship and the comparative sizes of the parties' respective businesses) were proper for him to consider in determining the duration of the new tenancy.

APPEAL from Judge Harold Brown, sitting at Southport County Court.

A company, Upsons Ltd., which owned some 250 branches of a boot and shoe retail business throughout the country, had been since 1927 the tenant of shop premises in Lord Street, Southport, the contractual lease of which was due to expire on July 1, 1954. The landlords of the Lord Street premises were a small private company, who occupied a lock-up shop in Burton's Arcade, Southport, where they had for 50 years carried on business as ladies' and childrens' outfitters; and they occupied under a tenancy agreement which was due to expire on February 1, 1957. They had purchased the Lord Street premises on November 30, 1950, with the intention of obtaining possession when the lease fell in and of transferring their business from Burton's Arcade to the Lord Street premises.

In 1954, the tenants of the Lord Street premises applied to the county court for a new lease under the Leasehold Property (Temporary Provisions) Act, 1951. The landlords opposed that application on the ground that, having regard to all the circumstances, it would be unreasonable to grant a new lease and that greater hardship would be caused by ordering the grant of a new tenancy than by refusing it; but the county court judge, on June 20, 1954, ordered a new tenancy for the term of 12 months from July 1, 1954, that being almost the maximum period which could be granted under the temporary statutory provisions.

After the coming into force of the Landlord and Tenant Act, 1954,[1] the tenants, on November 15, 1954, applied for a new tenancy under section 26 of that Act and proposed a lease for 14 years from October 1, 1955, at a rent of £900 per annum. On January 12, 1955, the landlords gave notice of intention to oppose the application on three grounds: first, that there was alternative accommodation available to the tenants; secondly, that they intended to reconstruct the premises; and thirdly, that they intended to occupy them for their own purposes, those being three of the grounds set out in section 30 (1) (*d*) (*f*) and (*g*) of the Act of 1954 which entitled the landlords as of right to oppose the grant of a new tenancy. Meanwhile, the landlords had obtained vacant possession of the upper floors of the Lord Street premises.

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[1] Landlord and Tenant Act, 1954, s. 30 (1): "The grounds on which a "landlord may oppose an application "under subsection (1) of section "twenty-four of this Act are such of "the following grounds as may be "stated in the landlord's notice . . . "that is to say:—. . . (*g*) subject as "hereinafter provided, that on the "termination of the current tenancy "the landlord intends to occupy the "holding for the purposes, or partly "for the purposes, of a business to "be carried on by him therein, or as "his residence. (2) The landlord "shall not be entitled to oppose an "application on the ground specified "in paragraph (*g*) of the last fore- "going subsection if the interest of "the landlord, or an interest which "has merged in that interest and but "for the merger would be the interest "of the landlord, was purchased or "created after the beginning of the "period of five years which ends with "the termination of the current "tenancy, and at all times since the "purchase or creation thereof the "holding has been comprised in a "tenancy or successive tenancies of "the description specified in subsec- "tion (1) of section twenty-three of "this Act."

S. 31: "(1) If the landlord opposes "an application . . . and establishes "any of those grounds to the satis- "faction of the court, the court shall "not make an order for the grant of "a new tenancy. (2) Where in a "case not falling within the last "foregoing subsection the landlord "opposes an application under the "said subsection (1) on one or more "of the grounds specified in para- "graphs (*d*), (*e*) and (*f*) of subsec- "tion (1) of the last foregoing section "but establishes none of those "grounds to the satisfaction of the "court, then if the court would have "been satisfied of any of those "grounds if the date of termination "specified in the landlord's notice "or, as the case may be, the date "specified in the tenant's request for "a new tenancy as the date from "which the new tenancy is to begin, "had been such later date as the "court may determine, being a date "not more than one year later than "the date so specified,—(*a*) the court "shall make a declaration to that "effect, stating of which of the said "grounds the court would have been "satisfied as aforesaid and specifying "the date determined by the court as "aforesaid, but shall not make an "order for the grant of a new "tenancy; . . ."

S. 33: "Where on an application "under this Part of this Act the "court makes an order for the grant "of a new tenancy, the new tenancy "shall be such tenancy as may be "agreed between the landlord and "the tenant, or, in default of such "an agreement, shall be such a "tenancy as may be determined by "the court to be reasonable in all the "circumstances, being, if it is a "tenancy for a term of years certain, "a tenancy for a term not exceeding "fourteen years, and shall begin on "the coming to an end of the current "tenancy."

At the hearing of the application in the county court in June, 1955, counsel for the landlords intimated that none of the three grounds of opposition could be maintained, and agreed that the judge was bound under the Act of 1954 to grant a new tenancy to the tenants, so that the only questions for the court to determine were the duration, rent, and other terms of the new tenancy, in the exercise of the discretion under section 33.

The county court judge, giving judgment on July 5, 1955, said that it was quite clear that the landlords opposed the grant of a new tenancy on the ground specified in section 30 (1) (*g*), namely, that they intended on the termination of the current tenancy to occupy the premises for the purposes of a business to be carried on by them therein, but that they were unable to establish that ground of opposition in view of the provision in section 30 (2) that a landlord shall not be entitled to oppose an application on the ground specified in section 30 (1) (*g*) if his interest was purchased or created after the beginning of a period of five years ending with the termination of the current tenancy; that as the current tenancy would terminate on September 30, 1955, and the landlords had purchased on November 30, 1950, their interest as landlords had been purchased two months short of the five-year period. Accordingly, the judge said that, in determining the duration of the new tenancy, he must be guided by section 33 of the Act of 1954, which provided that in default of agreement the new tenancy should be such a tenancy as might be determined by the court to be reasonable "in all the circumstances." He expressed the view that the words "in all the circumstances" were as wide as they could possibly be, and that he was entitled and bound, in fixing the duration of the new tenancy, to bear in mind the personal circumstances of the parties. Nothing, in his view, restrained him from restricting a new tenancy to a duration calculated so as not to cause excessive hardship to the landlords, excessive hardship being one of "all the circumstances" under section 33; if, he continued, by so doing he could avoid the anomaly by which a landlord who had acquired his reversion four years and ten months before the day of the termination of the existing tenancy might be kept out of his property for 14 years, whereas if he had acquired it two months earlier he would not be out of it at all, he could feel no regret. The judge ordered a lease for 12 months from October 1, 1955, and added that if he were wrong in his view as to the matters which he could properly take into consideration under section 33, the proper term to order would be seven years from the expiry of the present lease.

The tenants appealed.

*Lionel Blundell* for the tenants. The county court judge was wrong in law in taking into account, in deciding the duration of the new tenancy to be created under section 33, the "circumstance" that the landlords desired to have the premises for their own occupation in the near future. Though the words "in all the circumstances" in section 33 would normally give the court an unfettered discretion, the exercise of the discretion must be limited by the other provisions of this Part of this Act, and in particular by sections 30 and 31. The scheme of Part II of the Act is that the tenant of business premises shall automatically be granted a new tenancy unless the landlord can establish one of the seven grounds of opposition in section 30 (1), including the ground in paragraph (*g*), namely, that he wants to occupy for his own business purposes. If he can establish a ground his right is indefeasible and no consideration of hardship or unreasonableness can avail the tenant. But by section 30 (2) Parliament has specifically provided that only a certain class of landlord can rely on the ground in paragraph (*g*), namely, the landlord who has owned the reversion for five years before the date on which the current tenancy comes to an end; and the present landlords have failed to qualify as five-year landlords, albeit by two months only. Moreover, by section 31 (2) Parliament has given some protection to landlords who nearly attain their object of establishing the grounds of opposition specified in section 30 (1) (*d*) (*e*) and (*f*), by providing them with a second opportunity to oppose at a date a little removed from the termination of the current tenancy; but the ground in paragraph (*g*) is excluded from that category of extended protection. That omission supports the submission that the intention of a landlord to occupy the premises for his own business is to be disregarded if he is a less-than-five-year landlord.

[Denning L.J. But may not his desire or intention be one of the "circumstances" to be considered under the discretion conferred by section 33?]

No; for Parliament has already dealt exhaustively in section 30 (1) (*g*) and (2) with the case of a landlord intending to occupy himself. Once a landlord fails to establish his right under that section, the court has to grant a new tenancy; and in considering under section 33 the duration of that new tenancy the court cannot decide by reference to one of the circumstances which has already been cleared out of the way of the tenant by the preceding sections. It is of little value to give the tenants here the right to a new tenancy up to 14 years if that right is to be defeated by the court's view that because the landlords were only a few months short of five years they should have consideration for their intention to occupy.

[Denning L.J. The court may not consider it as one of "all "the circumstances" in every case. It is a matter of discretion.]

It is submitted, secondly, that the judge erred in law in treating the question of the length of the term as if it were an issue of greater hardship between the parties. Under the Leasehold Property (Temporary Provisions) Act, 1951, the court could have regard to "greater hardship," and in the earlier proceedings between these parties under that Act this judge considered that issue. But he has tried the same issue under the Act of 1954, which does not require greater hardship to be considered.

[Hodson L.J. But "all the circumstances" includes hardship on either party.]

Thirdly, it is submitted that the judge erred in law in allowing himself to be influenced by the conception he had formed of the tenants as a large company with 250 branches of its business, in contrast with the landlords who had one shop only. Large companies with many branches will have a difficult time under this Act if, whenever they establish their right to a new tenancy, the court defeats that right by considering the circumstances that they are a large company and accordingly grants them so short a new tenancy as to be of little practical value. The mere fact that the tenants have a large business does not limit their rights under the Act, which is intended to protect retail shopkeepers. It is a relevant circumstance that these tenants may have to wind up their Southport business if they cannot obtain a longer tenancy.

Fourthly, there was no sufficient evidence before the judge on which he could find that the landlords would have to quit their present premises on February 1, 1957; it was on the basis of that finding that he limited the tenants' new tenancy to one year only.

It was open to the court to grant the tenants a new seven-year or 14-year tenancy and then to define the circumstances in which the landlords could terminate the lease on due notice if they themselves were turned out of their present premises—for there is no fetter on the court's power to limit the terms of the new tenancy granted under section 33. The judge erred in taking into account evidence on this point which was inadmissible.

The words "in all the circumstances" in section 33 should accordingly be read in a limited sense, and the word "relevant" should be read into them.

*H. S. L. Rigg*, for the landlords, was not called on.

Denning L.J. Upsons Ltd. occupy a large number of shops where they sell Dolcis shoes. One of these shops is at Nos. 513/515, Lord Street, Southport. They have been there since 1927, nearly 30 years. Their contractual lease came to an end on July 1, 1954. The lease was extended by the judge for a year under the Leasehold Property (Temporary Provisions) Act of 1951, so it was due to come to an end on July 1, 1955. It was then automatically extended by the Landlord and Tenant Act of 1954 for a further period until September 30, 1955, and from that date forward the tenant has a right to a new lease unless the landlord can prove one of the grounds of opposition specified in the Act.

The landlords are Robins Ltd. They purchased the premises on November 30, 1950. They put forward three grounds of opposition to a new lease; first, on the ground that there was alternative accommodation available for the tenants; secondly, on the ground that they intended to reconstruct the premises; and thirdly, on the ground that they intended to occupy them for their own purposes. Those are all permissible grounds under section 30 of the Act of 1954; but it soon appeared that the landlords could maintain none of them, and all of them were withdrawn at the hearing before the county court judge.

I must mention the reason why the third ground failed. It failed because the provision of the Act in favour of a landlord who intends to occupy himself—section 30 (1) (*g*)—applies only in favour of a landlord who has been landlord for more than five years. These particular landlords, Robins Ltd., were just two months short of that time, and were thus unable to avail themselves of that provision of the Act. When it became clear that the landlords could not resist the grant of a new lease, the only matters for the county court judge to determine were the rent

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and the duration of the new lease. He determined the question of the rent at a figure which is not in dispute; but he decided that they should have only one year's extension, and it is against that decision that the tenants appeal. They say that they should have seven years.

The first point taken by Mr. Blundell on behalf of the tenants was that the judge ought not to have had regard to the fact that the landlords required the premises for their own purposes. The landlords proved here that they wanted to carry on their business of outfitters on the premises; and they said that there was a risk that they would have to leave their present premises. They asked, therefore, that the term of the lease should be as short as possible. Mr. Blundell asked us to say that the fact that the landlords wanted the premises for their own purposes was an irrelevant consideration, and not one to be taken into account by the judge.

I cannot accede to that view. Section 33 of the Act of 1954 provides that the new tenancy " shall be such a tenancy as may " be determined by the court to be reasonable in all the circum" stances, being, if it is a tenancy for a term of years certain, a " tenancy for a term not exceeding 14 years, and shall begin on " the coming to an end of the current tenancy." Those words " in all the circumstances " are amply wide enough to cover the present situation. I see no reason for cutting them down by reference to the earlier section—section 30 (1) (*g*)—which deals only with rights, and not with matters which come within the discretion of the court.

Mr. Blundell referred to section 31 (2), where a limited extension of the tenancy is in certain circumstances given to the tenant for a definite period, and after that the landlord gets possession. That section, too, concerns rights, and does not affect the scope of section 33, which states that the court has to consider " all the circumstances." I think that the judge here was entitled to have regard to the fact that the landlords require the premises for their own purposes.

Mr. Blundell then said that the judge considered the greater hardship in the case, and that he ought not not have done so because that came into the temporary Act of 1951 and did not appear in the new Act. In my judgment the words " in all the " circumstances " enable the court to consider hardship as well as other circumstances.

Then, said Mr. Blundell, the judge founded himself on the ground that the landlords would have quit their present premises on February 1, 1957, whereas there was no admissible evidence to that effect. The judge did not say that they *would* have to leave their present premises; he said that there was a danger or a real risk that they would have to leave them. There was ample material on which the judge could so hold, and there was no reason why he should not take that into account.

Mr. Blundell then argued that the judge was wrong because he took into account the fact that Upsons Ltd. have a chain of some 250 shops, and that the loss of one would be a comparatively small matter for them, whereas the landlords have just this one shop and they would suffer much more. I see no reason why the judge should not take that into account.

It seems to me that none of the criticisms are well founded. The judge seems to have said to himself: "The landlords bought "these premises not quite five years ago. They bought them in "order to get possession for their own business purposes. There "is a real risk that they may have to leave their own premises. "These tenants (Upsons Ltd.) are a large concern. They have "been there, it is true, for a number of years, but they have "had one year's extension of the contractual term already. If "they have another year I think that that is reasonable in all "the circumstances."

I see no error in point of law in the judge's reasoning. The width and scope of section 33 are such that he was entitled to take into consideration all the matters which he did, and I would dismiss the appeal.

Hodson L.J. I agree with the judgment of the county court judge, and with the judgment which my Lord has delivered. The main ground of appeal was that the county court judge had given the wrong interpretation to section 33 of the Landlord and Tenant Act, 1954. [His Lordship read section 33, and continued:] The argument put before the judge and before this court was that he was wrong in taking into account, for the purpose of this section, the desire of the landlords to have the premises for their own occupation in the near future. Mr. Blundell argues that the reason why the judge was wrong is because that matter had already been dealt with in an earlier section of the Act (section 30) where the landlord was shown to be entitled to oppose an application for a new tenancy if he desired the premises for his own occupation, and he was only barred in this case because he had been a landlord for less than five years.

Section 30 of the Act contains a number of grounds on which a landlord is entitled to oppose an application for a new tenancy as of right; and because the landlord fails (as this landlord did) to establish any right to oppose the new tenancy, it does not seem to me to follow that he is disentitled to rely on any of those matters which might be put forward as grounds, in so far as he can, in order to give the court the circumstances which are to be considered in deciding the terms of a tenancy—in particular, as in this case, the duration of the tenancy—because the fact that the landlords desire to occupy the premises themselves is obviously a relevant circumstance to be considered. As the county court judge put it in his judgment, it would indeed be an anomaly to be avoided (if proper to do so) that a landlord who acquired a reversion for four years and 10 months before the date of the termination of the existing tenancy might be kept out of his property for 14 years, whereas if he had acquired it two months earlier he would not be out of it at all.

I appreciate the force of the argument based on section 31 (2) —relied on principally by Mr. Blundell in support of his main argument—that whereas a landlord who nearly attains his object of achieving a successful opposition under section 30 (1) (*d*) (*e*) and (*f*) is given some protection by section 31 (2), yet the landlord who nearly attains his object under section 30 (1) (*g*)—that is to say, the man who has four years and 10 months instead of five years—is not given a similar extended protection under section 31 (2). But I do not think that that reference to that section takes Mr. Blundell any real distance on his road, because he is still quite unable to displace the plain meaning of the words of section 33, which show that all the circumstances of the case are proper to be taken into consideration in determining, among other things, the duration of the lease.

The second ground in the notice of appeal is: " that the judge " treated the question of the length of term to be granted as if it " were an issue of greater hardship between the applicants and " the respondents and thereby erred in point of law." I do not quite follow that, because the judge, in my opinion, was clearly right in considering the question of hardship. Hardship was one of the " circumstances " to be considered. This case emphasized the hardship on the landlords if they did not get their premises —they already have empty flats in the upper floors—being at risk of losing their existing premises, and having no other shop. Nevertheless, the judge did take into account other matters, namely, the matter chiefly relied on by the tenants, that they had been in occupation of this shop in Southport since 1927.

The next point relied on is that the judge founded his decision (at any rate in part) as to the period of the new tenancy on the assumption that the landlords would have to quit their present premises on February 1, 1957, whereas there was no evidence, or at any rate no admissible evidence, to that effect. The judge did not put it as high as that. He said (and I think rightly said) that there was a risk in the future that they might have to vacate their premises on that date, and there was evidence before him to that effect. It is true that there was no certainty that they would, and it is true, as Mr. Blundell said, that the landlords' managing director indicated in evidence that he did not mind being turned out if he could get possession of the premises which he now seeks to get on behalf of his company, because he prefers the Lord Street site to the old shop. The fact that the landlord expresses that view does not seem to me to make it irrelevant that the landlord might be turned out of his existing shop.

Finally, argument was addressed to us on the footing that the judge wrongly took into consideration the fact that the applicants were a large and powerful company with many branches, in contrast to the landlords who had only one shop. I am bound to say that I cannot see that that is an irrelevant consideration. My Lord (Denning L.J.) pointed out in the course of the argument that it might well be that the situation might be reversed; and the fact that the applicants for the new lease were a retail company in a small way of business would obviously, I should have thought, be a relevant consideration in determining whether a new lease should be granted, the duration, and the terms of a new lease. Similarly, if that is right, it would seem to follow that the argument would work the other way. I cannot, therefore, say that it is an irrelevant consideration that the applicants here are a large organization, whereas the landlords to this appeal appear to be relatively small.

I reject, therefore, all the grounds on which this appeal is based, and agree that the appeal should be dismissed.

Morris L.J. I also agree. If a landlord opposes an application for a new tenancy, and opposes it on the grounds set out in section 30 of the Act, and if he establishes any of those grounds, then the court must not make an order for the grant of a new tenancy. But the mere fact that a landlord is not able to oppose an application for a new tenancy does not seem to me to limit the ambit of the words " in all the circumstances " in section 33 of the Act. A consideration of " all the circumstances " of the

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case, if it is careful and complete (as it appears to me was the consideration by the judge in the present case) may inevitably involve considering how the "circumstances" tell on the fortunes of those concerned. I do not find in this case that the judge has erred in his approach, and I agree that this appeal fails.

*Appeal dismissed.*

Solicitors: *Waltons & Co.; Pritchard, Englefield & Co. for W. & R. Hodge & Halsall, Southport.*

M. M. H.

C. A.

## BURDEN *v.* HANNAFORD.

1955
*Oct.* 19, 20

Denning, Hodson and Morris L.JJ.

*Agriculture — Agricultural holding — Repairs — Compensation — Conflict between contractual and statutory obligations—Contract imposing no liability on tenant to repair hedges—Statutory clause imposing liability on tenant to repair hedges—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 6 (1) (2) (3)—*Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948 (*S.I.* 1948, *No.* 184), *Sch., Pt. II, para.* 5.

The terms of the lease of an agricultural holding provided that the tenant should not be liable to the landlord on quitting for dilapidations for hedges on the farm, nor entitled to compensation for work done on hedges during the tenancy. By the operation of section 6 (1) of the Agricultural Holdings Act, 1948, and the regulations made thereunder, a statutory clause was deemed to be incorporated in the lease, which imposed on the tenant the liability for the repair of hedges. The tenancy was brought to an end at the instance of the landlord, who claimed that, as from the date when the Act of 1948 came into force, he was entitled to be paid compensation for the tenant's failure to comply with the requirements of the statutory clause to repair the hedges:—

*Held,* that the contractual clause prevailed over the statutory clause, for subsection (2) of section 6 (relating to a case where "an "agreement in writing . . . effects substantial modifications in the "operation of regulations" made under subsection (1) ) indicated that a contractual term should prevail over a statutory term, subject to the power of either party to apply to an arbitrator to vary the contract so as to bring it into conformity with the statutory requirements; that the landlord was accordingly bound by the terms of the contract; and that, therefore, he was not entitled to claim compensation for the tenant's failure to repair hedges.

*Per* Hodson L.J. I think that the true position is that the incorporated regulation and the special condition must be read together. There is no question of one prevailing over the other.

The necessary result of reading them together is that the tenant is exonerated by the special condition from liability.

APPEAL AND CROSS-APPEAL from Judge H. M. Pratt, sitting at Totnes County Court, on a special case stated by the arbitrator for the opinion of the court under section 77 of the Agricultural Holdings Act, 1948.

The facts, so far as are relevant to the appeal, proved or admitted before the arbitrator, were as follows: On December 31, 1935, the owners of a holding known as East Bickleigh in the parish of Halwell, Devon, let it to Walter John Hannaford (hereinafter called the tenant). The lease imposed no liability as to the keeping in repair of hedges or fences and contained the following special clause: "The tenant shall not be liable to the "landlord for dilapidations on quitting for any of the hedges and "fences on the farm and shall not be entitled to any compensa-"tion on quitting for any improvement in the condition of the "hedges and fences which shall be effected by him during the "tenancy."

In December, 1940, the original landlords wrote to the tenant asking for his assistance in making up the hedges on the holding and stating that as they were too far away to attend to the matter they would allow the tenant for any work so done. On February 26, 1941, a document confirming the arrangement to allow the tenant for repairing hedges was prepared by the tenant's land agent and was signed by the original landlords. At various times after February 26, 1941, certain repair work was done by the tenant to some of the hedges on the holding.

On March 25, 1951, the original landlords conveyed the freehold of the holding to Horace John Burden (hereinafter called "the present landlord"). On December 29, 1950, the solicitors acting for the present landlord wrote to the tenant, informing him that the original landlords had sold the farm subject to the lease dated December 31, 1935, and subject to the document dated February 26, 1941; and on December 19, 1951, the present landlord's land agents wrote to the tenant asking him to agree to an increase of rent and drawing attention to the tenant's apparent freedom of liability for fences.

In 1948 and in 1952 the question as to what rent should be payable in respect of the holding was referred to arbitration under the Act of 1948 by the original landlords and the present landlord respectively. In these arbitrations the respective landlords drew attention to the tenant's freedom from liability for fences. On

March 17, 1952, the present landlord served a notice to quit on the tenant, and the tenant on March 20, 1952, served a counter-notice on the present landlord. On April 2, 1952, the present landlord applied to the Minister of Agriculture and Fisheries for the latter's consent to the operation of the notice to quit. The Minister refused to consent to the operation of the notice to quit, and on appeal from that refusal by the present landlord the Agricultural Land Tribunal allowed the appeal, but suspended the operation of the notice to quit until March 25, 1954. On March 19, 1953, the present landlord's solicitors wrote to the tenant, saying that the present landlord did not consider himself bound by the document dated February 26, 1941. As respective valuers for the parties were unable to agree the amount of compensation payable to the tenant or the amount of dilapidations payable to the landlord, an arbitrator was appointed by the Ministry.

At the arbitration it was contended on behalf of the landlords: (a) That as from the date on which the Agricultural Holdings Act, 1948,[1] came into force the tenant's exemption from liability for the repair of fences ceased and that the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948, No. 184),[2] made under section 6 of the

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[1] Agricultural Holdings Act, 1948, s. 6: "(1) The Minister may . . . "make regulations prescribing terms "as to the maintenance, repair and "insurance of fixed equipment which "shall be deemed to be incorporated "in every contract of tenancy of an "agricultural holding, whether made "before or after the commencement "of this Act, except in so far as they "would impose on one of the parties "to an agreement in writing a "liability which under the agreement is imposed on the other. "(2) Where an agreement in writing "relating to a tenancy of an agricultural holding, whether created "before or after the commencement "of this Act, effects substantial "modifications in the operation of "regulations under the foregoing "subsection, the landlord or the "tenant of the holding may, if he "has requested his tenant or landlord to vary the agreement so as to "bring it into conformity with the "provisions of regulations under that "subsection but no agreement has "been reached on the request, refer "to arbitration under this Act the "terms of the tenancy with respect "to the maintenance, repair and "insurance of fixed equipment: . . . "(3) On any reference under the last "foregoing subsection the arbitrator "shall consider whether . . . the said "modifications effected by the agreement are justifiable having regard "to the circumstances of the holding "and of the landlord and the tenant, "and, if he determines that they are "not justifiable as aforesaid, he may "by his award vary the terms "referred to arbitration in such "manner as appears to him reasonable and just between the landlord "and the tenant."

[2] S.I. 1948, No. 184, Sch., Pt. II: "Rights and Liabilities of the Tenant. "Except in so far as such liabilities "fall to be undertaken by the landlord "under Part I hereof: . . . 5. To "repair and to keep and leave clean "and in good tenantable repair, order

Act of 1948 (hereinafter referred to as "the model clauses") applied to the tenancy so as to impose on the tenant liability for the repair of fences. (b) That the landlord was in consequence liable only to pay the tenant, if he was liable at all, for repairs done to the hedges prior to the date on which the Act came into force, and then only at prices prevailing at the time at which the work was done. (c) Furthermore, that the landlord was entitled under section 57 of the Act to be paid compensation by the tenant for the latter's failure to repair hedges.

It was contended on behalf of the tenant: (a) That the landlord was throughout the term of the tenancy bound by the terms of the tenancy agreement and the document of February 26, 1941, and was estopped from denying his liability to compensate the tenant on quitting for repairs to hedges. (b) That section 6 of the Act must be read as a whole; that the tenancy agreement did effect "substantial modifications" in the operation of the regulations made under that section, but that no arbitration took place under section 6 (2) of the Act. (c) That consequently the tenant was entitled to be paid by the landlord for all work done to fences during the whole of the tenancy at prices prevailing at the date of the termination of the tenancy. (d) Furthermore, that the landlord was not entitled to any compensation from the tenant for the latter's failure to repair hedges.

The questions for the opinion of the court were: (i) whether the landlord was entitled in law to be paid compensation by the tenant for the latter's failure to repair hedges; and (ii) whether, and if so to what extent and at what price, the tenant was entitled to be paid by the landlord for work done to the fences during the tenancy.

The county court judge, on July 15, 1955, answered the first question in the negative; and on the second question found that the tenant was entitled to be reimbursed the actual cost of work done since February 26, 1941, the date of the letter on which the original landlords undertook to pay for such repairs to fences and hedges as might be carried out by the tenant. In formulating his reasons for those answers, the county court judge said that what he had to consider was whether the "model clause" in the regulations had the effect of wiping out the obligations set

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"and condition, the farmhouse, cottages and farm buildings, together "with all fixtures and fittings, drains, "sewers, water supplies, pumps, "fences, live and dead hedges, gates, "field walls, posts, stiles, bridges, "culverts, ponds, water courses, "ditches, roads and yards in and "upon the holding, . . ."

out in the written agreements. It had been conceded by counsel for the tenant that no liability was imposed on either party for hedges under the lease or the February 1941 agreement, so that the exception in section 6 (1) of the Act of 1948 did not apply, and accordingly it was necessary to incorporate the model clauses in the agreement by reading regulation 5 followed by the special condition in the lease of December 31, 1935. The judge held that regulation 5 and the special condition so read were incompatible, and that the contractual agreement should have the greater weight, since, reading section 6 as a whole, including the reference to "substantial modifications" in subsection (2), it would appear that the tenancy agreement effected substantial modifications in the model clause and that where such a conflict arose the model clause must give way to the contractual agreement, so that the original special condition continued to apply.

The landlord appealed. The tenant cross-appealed, contending that he ought to be paid on a valuation made at the date of quitting the holding and not at the date when the work was done.

*Note.*—The case is reported only on the first question stated by the arbitrator, namely, whether the landlord was entitled to be paid compensation by the tenant for the latter's failure to repair fences and hedges.

*G. R. F. Morris* for the landlord. The object of the Agricultural Holdings Act, 1948, was to bring tenancy agreements into a standard pattern in the interests of good husbandry. To that end section 6 (1) and the regulations made thereunder (S.I. 1948, No. 184) require in imperative form that the model clauses in Part II of the Schedule to the regulations shall be deemed to be incorporated in all contractual agreements save those which impose on the landlord or the tenant a liability which the model clauses impose on the other. As it is agreed that the special condition in the contractual agreement under consideration imposes no liability on either party in respect of hedges, the exception in subsection (1) does not apply, and the model clauses must accordingly be incorporated in toto in the contractual agreement. When that has been done, the resulting agreement between the parties imposes on the tenant the statutory liability to repair the hedges, the gap in the agreement imposing no liability on either being filled by the regulations; and the landlord is accordingly entitled to claim compensation, as from the date when the Act came into force, for the tenant's failure to repair hedges.

In these circumstances subsection (2) of section 6 has no application, for the "substantial modifications" contemplated by subsection (2) refer only to the situation provided for by the exception to subsection (1). A complete exemption from liability in the contract—a purely negative term—cannot be a "modification" of something which the statute makes a positive obligation on one or the other party. A "substantial modification" might arise if, for example, a term in the contract placed on the landlord the obligation to keep drains clean, that being an obligation which the model clause places on the tenant; and in that event the procedure for arbitration under subsection (2) would be available to the parties if they wished to bring the agreement into conformity with the regulations. Where the modification is trifling, it is submitted, the model clause cancels it out.

But where, as here, the contract imposes no positive obligation, then by the clear provisions of subsection (1) the model clause must override the special condition in the contract. The county court judge, having properly incorporated the model clause in the agreement, found that they were incompatible and, construing section 6 as a whole, held that the resulting conflict must be resolved, having regard to the terms of subsection (2), by allowing the contractual term to prevail over the model clause unless and until it was brought into conformity with the model clause by arbitration. It is submitted that that construction is wrong, that there was here no conflict amounting to "substantial modifications" within subsection (2), and that on the clear words of subsection (1) the model clause must prevail over the contractual special condition. Alternatively, if there are modifications, they are not substantial, and are cancelled out by the model clause.

[HODSON L.J. What happens to the special condition?]

It is replaced by the model clause. If it were now held that the contractual term prevails over the model clause, a private agreement between parties might defeat the intention of the legislature, which was to prevent "gentlemen's agreements" by which it was left to the option of one or other party to deal with certain items of fixed equipment, including hedges. It would not be possible today to incorporate a special condition such as this in a lease, for it would be a nullity: see Scammell on the Law of Agricultural Holdings, 2nd ed., p. 17.

*D. M. Scott* for the tenant. The landlord's case is founded on the proposition that, in the material respect, the contract between the parties has, by statute, been varied to the point of contradiction in such a manner as to impose a fresh obligation on the tenant. On well-established principles such a result can only be produced by clear and unambiguous language in the statute relied on. No such clear and unambiguous language is to be found in section 6 of the Agricultural Holdings Act, 1948. Indeed, on its proper construction that section bears a meaning opposite to that contended for by the landlord.

It is conceded that the model clause must be incorporated in the agreement under consideration; but the composite agreement resulting thereby then provides: (*a*) the tenant shall *not* be liable for hedges—under the contract; and (*b*) the tenant *shall* be liable for hedges—under the model clause. That is a complete contradiction. To resolve it the other provisions of section 6 must be read with subsection (1). It is submitted that where such a contradiction arises in a composite agreement coming into existence in obedience to the direction in subsection (1) to incorporate the model clause, then, unless the arbitration procedure is invoked, the agreement modifies the regulations and not vice versa. For, first, section 6 (2) clearly contemplates that it shall be the agreement which modifies the operation of the regulations; and, secondly, it is inappropriate to speak (as the subsection does) of an agreement *effecting* modifications unless those modifications are effective.

The landlord's contention that the "substantial modifications" contemplated by section 6 (2) refer only to the situation provided for by the exception to section 6 (1) cannot be right. The language of subsection (2) is not "where an agreement in "writing . . . effects substantial modifications in the regulations" but "in the operation of the regulations." The regulations only operate by virtue of being deemed to be incorporated; and where, as in the case postulated on behalf of the landlord, the contradiction is so fundamental that an obligation is imposed by the agreement on one party and by the regulations on the opposite party, pro tanto that part of the regulation would not be deemed to be incorporated at all, and would not, accordingly, be in operation. Subsection (2) on its true construction means that the agreement is to prevail over the regulations, the parties having the right to go to arbitration to have the matter brought into conformity with the regulations. That construction is supported by the words of subsection (3), namely, that the arbitrator "shall "consider whether the modifications effected by the agreement "are justifiable." There is no object in providing elaborate machinery for bringing into conformity something which has already (according to the landlord's argument) been steamrollered into conformity by the mere incorporation of the regulations.

Again, the landlord contends that the material modification (if any) is not substantial and hence is ineffective. But the restriction of the provision for arbitration in subsection (2) to cases where the modifications are substantial is in deference to the de minimis principle. The legislature did not intend that where the modifications were trifling the parties should have the right to use this rather costly procedure of arbitration. Accordingly, trifling modifications are to remain effective in any event and not to be steamrollered out of the agreement by the incorporated model clause.

The flat contradiction here between the special condition in the lease and the model clause is a "substantial modification" and is effective, since the procedure laid down by subsection (2) was never invoked; equally so if the modification is not substantial.

It is submitted, secondly, that as the respective landlords here went to arbitration in 1948 and 1951 against this tenant, seeking, and in fact obtaining, an increase of rent on the ground, mainly, of the tenant's freedom from liability for hedges; and as the present landlord, in 1952, used the same argument in support of his successful application to the Minister for consent to the operation of a notice to quit, it would not, at any material time, in an arbitration under subsection (2) have lain in his mouth to contend that the modifications here in question were not justifiable.

Thirdly, it is submitted that the landlord here has elected to claim compensation under section 57 (1) of the Act of 1948. Section 57 (1) creates a statutory right to compensation; section 57 (3) declares or preserves an alternative right to compensation under a written contract of tenancy. The contrast between subsections (1) and (3) of this section is emphasized by the language of section 7 (1), which refers to "compensation . . . payable either "*under* subsection (1) of section 57 of this Act or *in accordance* "*with* subsection (3) of that section." By section 57 (3) (*b*) "compensation shall not be claimed in respect of any one holding "both under such a contract and under the said subsection (1)." In the present landlord's particulars of claim in the arbitration each item is stated to be claimed "under section 57 of the Agri- "cultural Holdings Act, 1948." No subsection is specified; but one item does not arise out of the agreement and can only be claimed under section 57 (1). These particulars must be construed as formulating a claim under section 57 (1), but the model clauses only operate, if they operate at all, by virtue of being deemed to be incorporated in a tenancy agreement. Thus a claim founded on the alleged effect of the regulations is a claim under the agreement and not under section 57 (1); and the landlord has formulated no claim under the agreement. [*Barrow Green Estate Co.* v. *Executors of Walker, decd.*,[3] and *Evans* v. *Jones*[4] were referred to.]

*Morris* replied.

DENNING L.J. This case concerns the dilapidations at the end of a tenancy of a farm known as East Bickleigh at Halwell in Devonshire. The short question is what is to happen when the agreed contractual terms of the tenancy come into conflict with the model clauses which are incorporated by statute into the contract.

In 1935 the owner of a farm in Devon let it to a tenant on terms which imposed no liability as to the keeping in repair of the hedges and fences, but which included this special clause: "The tenant shall not be liable to the landlord for dilapidations "on quitting for any of the hedges and fences on the farm and "shall not be entitled to any compensation on quitting for any "improvement in the condition of the hedges and fences which "shall be effected by him during the tenancy." That clause clearly meant that if the tenant chose to repair the fences for his own convenience, he could do so, but he did not get any compensation for it; and on the other hand, if he failed to repair them, he was not under any liability to the landlord for dilapidations.

In 1948 the Agricultural Holdings Act, 1948, came into operation. By section 6 (1) of that Act the Minister was empowered to make regulations prescribing terms "as to the maintenance, "repair and insurance of fixed equipment which shall be deemed "to be incorporated in every contract of tenancy of an agricul- "tural holding." The Minister made regulations (Agriculture (Maintenance Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948, No. 184)) under which there was deemed to be incorporated into this contract of tenancy a statutory clause whereby the tenant was made liable "to repair and to keep and "leave clean and in good tenantable repair, order and condition ". . . fences, live and dead hedges," and so forth.

Section 6 (1) contained an exception which said that the statutory clauses were not to be incorporated "in so far as they "would impose on one of the parties to an agreement in writing

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[3] [1954] 1 W.L.R. 231; [1954] 1 All E.R. 204.

[4] [1955] 2 W.L.R. 936; [1955] 2 All E.R. 118.

"a liability which under the agreement is imposed on the other." That exception did not apply in this case because under the tenancy agreement no obligation was imposed on either party to repair the hedges and fences. So the statutory clauses (or model clauses, as they are sometimes called) were incorporated into the contract.

Although the statutory clauses are incorporated, it appears that one of them cannot stand with the agreed contractual clause. The statutory clause says that the tenant is to leave the fences in good repair, but the contractual clause says that the tenant is not liable for dilapidations to the fences. Which is to prevail?

In my opinion the contractual clause still binds the parties. Reading section 6 as a whole, I think that, if any conflict appears between a statutory clause and a contractual clause, then it is the contractual clause which must be given effect. If modifications are necessary to make the two run together, then modifications must be made in the statutory clause, and not in the contractual clause, subject, however, to the power of either party to apply to an arbitrator to vary the contractual clause. The section provides that either party may apply to an arbitrator to vary the contractual clause so as to bring it into conformity with the statutory clause; and if the arbitrator thinks right, he can make such variations as he thinks are justifiable in the contract. But he may not think it justifiable to make them, and if so, he need not make them, and the contractual clause prevails. In this particular case neither party applied to an arbitrator to vary the contractual clause. That being so, the contractual clause still remains good.

Later events show that the landlord acted on the view that the contractual clause still applied. On two occasions he applied for an increase of rent, and to support his case he asserted that the tenant was under no obligation to repair the hedges and fences. He was given increases. The landlord later gave a notice to quit to the tenant, and he succeeded before the tribunal in getting the consent of the Minister to the eviction of the tenant. In those proceedings again he asserted that the agreement did not require the tenant to keep up the hedges and fences, and he made it a reason for getting possession. Now that the landlord has got the tenant out, he turns round and makes this claim for dilapidations on the basis that the tenant was liable under the statutory clause. But he is met by the contractual clause which says that the tenant shall not be liable to the landlord for dilapidations on quitting for any of the hedges and fences on the farm. I think that that clause prevails so as to exempt the tenant.

In the result I find myself in agreement with the county court judge on both the points which he decided, and I would dismiss the appeal.

HODSON L.J. The first question is whether the landlord is entitled to be paid compensation by the tenant for the latter's failure to repair hedges. That question depends on the construction of the lease of December 31, 1935, made between the tenant and the landlord's predecessors in title, and also on section 6 of the Agricultural Holdings Act, 1948, and the regulations made thereunder. In my judgment the county court judge was right on that question of construction, and I think that he rightly answered the question in the negative.

By the terms of the lease the tenant was plainly not liable to the landlord for dilapidations on quitting for any of the hedges and fences on the farm, and on the construction of the lease alone there would have been no question. But the landlord has argued before the judge and in this court that the effect of the incorporation of regulation 5 made under section 6 (1) of the Act of 1948 is to produce the opposite result. There being no liability on the tenant to repair, it is agreed between the parties that section 6 (1) operates so as to incorporate the regulation imposing an obligation on the tenant "to repair and to keep and leave clean and in good "tenantable repair, order and condition, the farmhouse, cottages "and farm buildings, together with all fixtures and fittings, "drains, sewers, water supplies, pumps, fences, live and dead "hedges," etc. The argument which has been put before the court for the landlord is that as from the date of the Act of 1948 coming into operation, the regulation prevailed; that it would make nonsense of the Act and the policy of the Act if the tenant were entitled to rely on the special condition; and that once one finds the regulation incorporated, the inevitable result followed that the tenant was liable.

I think the true position is that the incorporated regulation and the special condition which I have read must be read together. There is no question of one prevailing over the other. It was argued on behalf of the landlord that there was here a gap—a gap which the regulation was designed to fill. But the answer to that on behalf of the tenant was, I think, correctly given by Mr. Scott when he said that it was not right to say that there was a gap when one party under the agreement was excused from liability. So that this is not a case where there is a void in the agreement which is being filled by the regulation. What has to be done is to read the two together; and when one finds, I agree, the remarkable result that the tenant is in fact exonerated by the special condition from liability to pay, that, in my judgment, is the necessary result of reading together the regulation and the special condition.

That result is reinforced by consideration of subsection (2) of section 6, which reads as follows: "Where an agreement in "writing relating to a tenancy of an agricultural holding, whether "created before or after the commencement of this Act, effects "substantial modifications in the operation of regulations under "the foregoing subsection, the landlord or the tenant of the "holding may, if he has requested his tenant or landlord to vary "the agreement so as to bring it into conformity with the provisions of regulations under that subsection but no agreement "has been reached on the request, refer to arbitration under this "Act the terms of the tenancy with respect to the maintenance, "repair and insurance of fixed equipment." The reference there to the agreement effecting "substantial modifications" in the operation of regulations appears to me quite inconsistent with the idea that regulations of themselves are to have the effect of obliterating the substance of an agreement. It is immaterial to that argument, in my view, to consider whether in this case there could be what may be regarded as a "substantial modification" in the operation of the regulation.

In other words, it is unnecessary to answer the question posed by Mr. Morris: could there be said to be a modification of the regulation when the regulation imposes a liability to repair, and the agreement merely exonerates from payment? Whatever answer may be given to that question, it seems to me that the argument remains the same, that subsection (2) contemplates the agreement modifying the regulation. In other words, it contemplates both subject-matters being construed together. The effect of that construction, to my mind, is inevitable in leading to the conclusion that the tenant here is right, and that he is exonerated.

It is unnecessary to say anything about the other matters raised on this appeal by the tenant because that disposes of that point. So far as the cross-appeal is concerned, no doubt the document in question is open to more than one construction; but on the whole I have come to the conclusion that the county court judge was right. I think that the cross-appeal must fail.

MORRIS L.J. I have reached the same conclusion. It is common ground that the special clause must be deemed to be incorporated in the contract. That is the effect of section 6 (1). That subsection ends with the words: "except in so far as they "would impose on one of the parties to an agreement in writing "a liability which under the agreement is imposed on the other." It has been common ground that there was no liability imposed under the agreement to repair the fences and hedges, and so the words of the exception do not apply.

The case has been approached by all and has proceeded on the basis that the model clause is to be deemed to be incorporated.

On that basis I have felt, as my Lords have felt, that great assistance is to be derived by looking at the wording of subsections (2) and (3) of section 6. I think it is fair to look at section 6 as a whole. It is true that subsection (2) is referring to cases where the agreement relating to a tenancy is in writing. The subsection refers to cases where an agreement in writing "relating to a tenancy of an agricultural holding . . . effects "substantial modifications in the operation of regulations under" subsection (1). I think that there is force in the submission of Mr. Scott that the wording denotes that it is the agreement which effects "substantial modifications" in the operation of the regulations as opposed to the regulations modifying the agreement.

I think that there is also force in another point taken by Mr. Scott in reference to the term "substantial modifications." Supposing that there were trifling modifications, does not the subsection indicate that those trifling modifications would prevail?—in other words, that the agreement would prevail if it effects trifling modifications in the operation of the regulations. If the agreement effects "substantial modifications," then the subsections provide machinery as to what may happen. There may be an arbitration, and the powers of the arbitrator include powers to vary the agreement so as to bring it into conformity with the provisions of the regulations. All this points to the view that the agreement prevails until any steps are taken to vary it. That being so, in this case nothing has happened to vary the agreement, and I think that the agreement prevails in so far as it conflicts with the model clause which was deemed to have been incorporated in the contract. I think, therefore, that the judge came to a correct conclusion.

*Appeal dismissed.*
*Cross-appeal dismissed.*
*Leave to appeal to House of Lords refused.*

Solicitors: *Church Rendell for Kellock & Cornish-Bowden, Totnes; Collyer-Bristow & Co. for Rossetti & Peppercorn, Kingsbridge.*

M. M. H.

## *In re* A SOLICITOR.

1955
*Oct.* 18.

Pearson J.

*Solicitor—Costs—Taxation—Non-contentious business—Oral agreement to charge less than authorized scale alleged—Enforceability—Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 57.

A firm of solicitors, having performed certain non-contentious business on behalf of a client, applied to the taxing master for taxation of their bill of costs. The client objected to the master's taxation, alleging an oral agreement with the firm that they would charge less than the authorized scale:—

*Held* that, on the plain meaning of section 57 (3) of the Solicitors Act, 1932, an agreement between solicitor and client with regard to the amount of charges for non-contentious business must be in writing in order to displace the authorized scale; accordingly, the alleged oral agreement could not be relied on by the client.

*Quaere*, whether a similar agreement between solicitor and client in regard to contentious business was also required to be in writing.

*Jennings* v. *Johnson* (1873) L.R. 8 C.P. 425 and *Clare* v. *Joseph* [1907] 2 K.B. 369; 23 T.L.R. 498 considered.

Appeal from Master Graham-Green.

The taxing master having taxed certain bills of costs relating to a number of conveyancing transactions carried out by a firm of solicitors on behalf of a client, the client objected to the taxation, alleging the existence of an oral agreement between the solicitors and himself to charge less than the authorized scale in some cases and nothing at all (save out-of-pocket expenses) in others. The taxing master, being of the opinion that section 57 of the

1955

A SOLICITOR, *In re.*

Solicitors Act, 1932,[1] clearly required an agreement as to the remuneration of the solicitor in non-contentious business to be in writing, overruled the client's objections. The client appealed to Pearson J. in chambers, who adjourned his judgment into open court.

*Paul Curtis-Bennett* for the client.
*Leslie Wainstead* for the solicitors.

*Cur. adv. vult.*

Oct. 18. PEARSON J. In this case the firm of solicitors did a considerable amount of conveyancing work for their client. On September 6, 1954, on the application of the solicitors, an order was made for taxation of their bill of costs. The costs were taxed by the taxing master, Master Graham-Green, and the ordinary scale costs of conveyancing were allowed. Then the client by objections in writing dated May 26, 1955, objected to numerous items, because he said that he had made an oral agreement with the solicitor, who was at one time (as was said) the sole partner in the firm, that the firm would charge less than the authorized scale in some cases and would make no charge, save out-of-pocket expenses, in certain other cases.

The question then arose whether the alleged oral agreement, if made, could in law be relied upon by the client as a reason for reducing the amounts allowed, which were the scale costs, to lower figures in some cases, or to nil in other cases, in accordance with the alleged oral agreement. This question was argued before the taxing master and decided by him as a preliminary question of law, and he decided that the alleged oral agreement, even if made, could not be relied upon, and therefore he has not decided whether or not the alleged agreement was in fact made. This matter then came before me as judge in chambers on an application for review of the taxation. The procedure is in order because the taxing master has overruled the objections, and his taxation stands on that basis, and this application is for a review of his taxation involving a reconsideration of that question of law.

Normally, I suppose, a firm of solicitors would not think it right to take advantage of the absence of writing to defeat an oral agreement with their client for lower fees to be charged. But in this case there is, as I understand, a special situation which I have not investigated, as it is not relevant to the issue to be decided—and it is enough to say that the person seeking to exclude the alleged oral agreement is not the person with whom it is alleged to have been made.

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[1] Solicitors Act, 1932, s. 57: "(1) "Whether or not any order is in "force under the last preceding sec- "tion, a solicitor and his client may, "either before or after or in the "course of the transaction of any "non-contentious business by the "solicitor, make an agreement as to "the remuneration of the solicitor in "respect thereof. . . . (3) The agree- "ment shall be in writing and signed "by the person to be bound thereby "or his agent in that behalf."

The master's answers to the client's objections were as follows: "(1) In this case I have been attended by counsel for "the above-named solicitors and for the client on various dates "between October 19, 1954, and July 25, 1955, and I have taxed "five bills of costs comprising some twenty-nine separate conveyancing transactions each attracting its own separate fee, but "all clearly classified as 'non-contentious business.' (2) In the "course of the taxation the client alleged the existence of an "agreement to charge less than the authorized scale in some "cases and to charge nothing (save out-of-pocket expenses) in "others. (3) The client has applied to me and has been granted "inspection of the solicitors' accounts and has had such access "as was necessary to the solicitors' papers and admits there is "no agreement in writing signed by the person to be bound "thereby (or at all) as required by section 57 (3) of the Solicitors "Act, 1932. (4) The client now alleges the existence of an "oral agreement between the solicitors and himself to charge "less than the authorized scale in some cases and nothing at "all (save out-of-pocket expenses) in others, and that no written "agreement is necessary in view of the dictum of the Court of "Appeal in *Clare* v. *Joseph*[1] (approving *Jennings* v. *Johnson*[2]). "(5) The case of *Clare* v. *Joseph* was decided by the Court of "Appeal on the basis (i) that the common law made a distinction "between agreements favourable to the client and those unfavourable (see also Cordery on Solicitors, 4th ed., p. 328). (ii) that "the legislature did not intend section 4 of the Attorneys and "Solicitors Act, 1870 (which required the agreement to be in "writing), to apply to an agreement which was favourable to the "client. (6) It is contended by the client that section 4 of the "Attorneys and Solicitors Act, 1870, applied to both contentious "and to non-contentious business and that it is for all intents "and purposes similar to sections 57 and 59 of the Solicitors "Act, 1932. (7) In fact: (i) The subject-matter of *Clare* v. "*Joseph*[3] and *Jennings* v. *Johnson*[4] related solely to contentious

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[1] [1907] 2 K.B. 369; 23 T.L.R. 498.

[2] (1873) L.R. 8 C.P. 425.

[3] [1907] 2 K.B. 369.

[4] L.R. 8 C.P. 425.

"business. (ii) At the date when the decision of the Court of "Appeal in *Clare* v. *Joseph* was given the legislature had "separated contentious and non-contentious business so that at "that date the Attorneys and Solicitors Act, 1870, applied "solely to contentious business and non-contentious costs were "governed by section 8 of the Solicitors Remuneration Act, "1881. (iii) This separation of the two classes of business has "been maintained in the Solicitors Act, 1932, which repeals "the Attorneys and Solicitors Act, 1870, and the Solicitors "Remuneration Act, 1881, and adopts quite dissimilar wording "in section 57 for non-contentious to that in section 59 for "contentious matters. (8) In my view whilst section 59 may "permit a client to make an oral agreement favourable to himself "the wording of section 57 is clear and requires of 'a solicitor "'and his client' who desire to make an agreement as to the "remuneration of the solicitor in non-contentious business that "the agreement shall be in writing and signed by the person to "be bound thereby. (9) For the above reasons I overrule the "whole of these objections."

Mr. Paul Curtis-Bennett, for the client, argued that under section 4 of the Attorneys and Solicitors Act, 1870, it was held that the client could rely upon an oral agreement for special charges to be made; and that that must still be the position in regard to contentious business under section 59 of the Solicitors Act, 1932, which is a merely consolidating Act; and that the position should have been and still should be the same in relation to non-contentious business under the Solicitors Remuneration Act, 1881, and section 57 of the Solicitors Act, 1932, as otherwise there would be an anomaly. He also claimed to have found in the judgment of the court in *In re West, King & Adams, Ex parte Clough* [5] an obiter dictum to the effect that the client could rely upon an oral agreement in relation to non-contentious business under the Act of 1881.

On the other hand, Mr. Wainstead for the firm of solicitors was prepared to admit for the purposes of the argument that the position is anomalous, but he contended that, nevertheless, effect must be given to the plain words and unmistakable meaning of the Act of 1881 as reproduced in section 57 of the Act of 1932.

There are two real or apparent anomalies or inequities which can be suggested if the contention on behalf of the firm, upholding the decision of the taxing master, is correct, namely, (1) in relation to contentious business the client can, but the solicitor cannot, rely upon an oral agreement, and (2) the client's right to rely upon an oral agreement exists only in relation to contentious business and not in relation to non-contentious business. I therefore reserved judgment for further consideration, and as there is apparently no previous decision, so that this one may be referred to in other cases, judgment is being given in open court in order that the reasons may be known.

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[5] [1892] 2 Q.B. 102.

The position as it was before the Act of 1870 is set out in Cordery on Solicitors, 3rd ed., p. 261, and this passage has been expressly stated to be correct in the judgment of Lord Alverstone C.J. in *Clare* v. *Joseph.*[6] What is said in the passage is: "Under "the old law a solicitor might settle his accounts with his client "so as to take a gross sum in payment of costs already incurred, "though no bill was delivered, where the settlement was made "fairly and with proper knowledge on both sides; but there was "some difficulty in upholding it, since in many cases it might be "the solicitor's duty to advise the client against such a mode of "payment. And a special agreement, whether in writing or not, "touching the scale or mode of remuneration as to costs to be "incurred, was not binding on the client so as to preclude the "delivery and taxation of a proper bill; but in the absence of a "plea of no signed bill delivered, the solicitor could recover in an "action. On the other hand, an agreement to take less than he "would otherwise have been entitled to was binding on the "solicitor. Thus it was a good defence to an action by the "solicitor that he had agreed to charge nothing for his trouble, "or to charge costs out of pocket only, or that the costs out "of pocket should not exceed a limited sum. And where a "solicitor undertook an action on the terms that he was not to be "paid unless it succeeded, he could not, on its failure, recover "even costs out of pocket."

That was the position before the Act of 1870. Then we come to the Attorneys and Solicitors Remuneration Act, 1870. Section 4 opens with some words which may be said to be curiously one-sided and one finds that there is an important point which arises from that. Section 4 is in these terms: "An "attorney or solicitor may make an agreement in writing with "his client respecting the amount and manner of payment for "the whole or any part of any past or future services, fees, "charges, or disbursements in respect of business done or to be "done by such attorney or solicitor, whether as an attorney or

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[6] [1907] 2 K.B. 369, 372.

"solicitor or as an advocate or conveyancer, either by a gross "sum, or by commission or per-centage, or by salary or other-"wise, and either at the same or at a greater or at a less rate as "or than the rate at which he would otherwise be entitled to be "remunerated, subject to the provisions and conditions in this "part of this Act contained: Provided always, that when any "such agreement shall be made in respect of business done or "to be done in any action at law or suit in equity, the amount "payable under the agreement shall not be received by the "attorney or solicitor until the agreement has been examined "and allowed by a taxing officer of a court having power to "enforce the agreement; and if it shall appear to such taxing "officer that the agreement is not fair and reasonable he may "require the opinion of a court or a judge to be taken thereon by "motion or petition, and such court or judge shall have power "either to reduce the amount payable under the agreement or to "order the agreement to be cancelled and the costs, fees, charges "and disbursements in respect of the business done to be taxed "in the same manner as if no such agreement had been made."

It will be observed that under that Act when passed section 4 applied both to contentious and to non-contentious business.

There was a case decided under section 4, namely, *Jennings* v. *Johnson.*[7] The headnote states very shortly: "An agree-"ment by an attorney with a client 'to charge him nothing if "'he lost the action, and to take nothing for costs out of any "'money that might be awarded to him in such action,' need "not be in writing." There were very short judgments delivered. Bovill C.J. said[8]: "There is no ground for a rule in "this case. The object of section 4 was to enable the attorney "in certain cases to claim more than he would otherwise be "entitled to. For that purpose the agreement must be in "writing. Section 11 was intended to provide against cham-"perty. But a promise not to charge anything for costs is not "champerty." Brett J. said[9]: "I am of the same opinion. "The act was not intended to prevent such an agreement as "this. The jury thought fit to believe the plaintiff and to dis-"believe the defendant." Grove and Honyman JJ. concurred. That is a decision given very soon after the Act was passed, when it may well be that the situation in relation to which and the purpose for which it was passed were well in everybody's mind.

Then in order of date comes the Solicitors Remuneration

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[7] L.R. 8 C.P. 425.

[8] Ibid. 426.

[9] Ibid.

Act, 1881, which brings in a separate set of provisions for non-contentious business. The long title of the Act is: "An Act "for making better provision respecting the remuneration of "solicitors in conveyancing and other non-contentious business." Section 2 sets up, in effect, a committee with power to make general orders for remuneration in conveyancing. It provides that the committee, composed of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls and others "may from time to time make any such general "order as to them seems fit for prescribing and regulating the "remuneration of solicitors in respect of business connected with "sales, purchases, leases, mortgages, settlements, and other "matters of conveyancing, and in respect of other business not "being business in any action, or transacted in any court, or in "the chambers of any judge or master, and not being otherwise "contentious business, and may revoke or alter any such order." Those proposed rules are to be communicated to the Incorporated Law Society. Section 4 states what kind of rules they may be and what kind of remuneration may be prescribed. Section 6 provides that any such proposed general order shall be laid before each House of Parliament. Section 7 provides: "As long as "any general order under this Act is in operation, the taxation "of bills of costs of solicitors shall be regulated thereby." Section 8 provides: "(1) With respect to any business to "which the foregoing provisions of this Act relate, whether "any general order under this Act is in operation or not, it "shall be competent for a solicitor to make an agreement with "his client, and for a client to make an agreement with his "solicitor, before or after or in the course of the transaction of "any such business, for the remuneration of the solicitor, to such "amount and in such manner as the solicitor and the client think "fit, either by a gross sum, or by commission or per-centage, "or by salary, or otherwise; and it shall be competent for the "solicitor to accept from the client, and for the client to give "to the solicitor, remuneration accordingly. (2) The agreement "shall be in writing, signed by the person to be bound thereby "or by his agent in that behalf. . . . (4) The agreement may be "sued and recovered on or impeached and set aside in the like "manner and on the like grounds as an agreement not relating "to the remuneration of a solicitor. . . ." Section 9 provides: "The Attorneys and Solicitors Act, 1870, shall not apply to any "business to which this Act relates."

I think that the main point to notice there is the difference of

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A SOLICITOR, *In re.*

Pearson J.

wording in section 8 of the Act of 1881 from the wording in section 4 of the Act of 1870. Section 4 of the Act of 1870 oddly provided only that a solicitor may make an agreement with his client, but section 8 of the Act of 1881 says: "it shall be com-"petent for a solicitor to make an agreement with his client, "and for a client to make an agreement with his solicitor." It is clearly regarding the transaction from each of its two sides.

In *In re West, King & Adams, Ex parte Clough* [10] the decision was, as reported in the headnote: "A client employed a solicitor "to transact for him certain business, partly contentious and "partly non-contentious, and deposited with him a sum of "money to be applied in payment of the costs to be incurred in "such business. After the costs had been incurred, and before "delivery of any bill, the solicitor and the client settled by "oral agreement the amount of the costs at a lump sum, which "sum the solicitor retained out of the money deposited with "him. The client having subsequently become bankrupt, his "trustee applied for the delivery of a bill of his costs by the "solicitor:—*Held*, that the retainer of the money by the solicitor "did not amount to payment, and that a bill must be delivered."

Mr. Paul Curtis-Bennett was seeking to rely on a passage in the judgment of Cave J. in which he sought to find an obiter dictum to the effect that in regard to non-contentious business the client could rely upon an oral agreement, even if the solicitor could not. Cave J. said [11]: "Secondly, as to the verbal "agreement as to the amount of costs. The statute which now "governs agreements as to costs between solicitor and client in "non-contentious business is the Solicitors Remuneration Act, "1881, which enacts (section 8 (2)) that such agreements shall "be in writing, and signed by the party to be charged. The last "section of this Act excludes the Solicitors Remuneration "Act of 1870 as to all business to which the Act of 1881 applies. "Now, the Act of 1870 enacted by section 4 that an attorney or "solicitor might make an agreement in writing with his client "respecting the amount of his costs amongst other things, which "agreement, it was decided in *In re Lewis*,[12] must be signed by "both solicitor and client. It was further held, in *In re Russell*, "*Son & Scott*,[13] where the buiness was contentious, that since "the Act of 1870 a verbal agreement as to the amount of costs "is not binding on the client. We are of the same opinion with

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[10] [1892] 2 Q.B. 102.

[11] Ibid. 105.

[12] (1876) 1 Q.B.D. 724.

[13] (1886) 30 Ch.D. 114; 2 T.L.R. 598.

"regard to a verbal agreement as to the costs of non-contentious "business under the Act of 1881. The verbal agreement here "can, in our opinion, afford no answer to this application, and "may be disregarded; though we think that if there had been "here, as there was in the case of *Stedman* v. *Collett*,[14] a "perfectly fair agreement in writing signed by the client, that "might have been a good answer to this application. The only "defence, therefore, which we have to consider is that of "payment."

As to that passage, it is to be observed that in that case it was the solicitor or those acting for the solicitor who were seeking to rely upon an oral agreement, and that passage is saying that the solicitor is not entitled to rely upon an oral agreement for a special charge in relation to costs, either in regard to non-contentious business or in regard to contentious business, neither under the Act of 1870 as to contentious business, nor under the Act of 1881 as to non-contentious business, and, in my view, that passage in Cave J.'s judgment is not dealing with the opposite position on the client's side. That passage is not saying whether or not the client can rely upon an oral agreement; it does not say so, either expressly or by implication; it simply does not deal with that subject at all, because it did not arise for decision in that case.

In *Clare* v. *Joseph*[15] the headnote reads: "An agreement "by a solicitor with a client to charge him nothing for costs if "he won his action, and, if he lost it, to charge only the same "amount for costs as he would have recovered from the opposite "party had the action been successful, is not an agreement "which is required by section 4 of the Attorneys and Solicitors "Act, 1870, to be in writing. *Jennings* v. *Johnson*[16] approved." I have already pointed out that Lord Alverstone C.J. said that the passage in Cordery on Solicitors, 3rd ed., p. 261, is correct.

I think it is possible to pass over the rest of Lord Alverstone's judgment, which is on the same lines as those of the two Lords Justices, and to go to the passage in the judgment of Fletcher Moulton L.J.[17]: "It is to be remarked in the first place"—the Lord Justice is referring to section 4 of the Act of 1870—"that "this is a purely enabling, and not a disabling, section, and the "court would not, unless forced to do so, construe such a section "so as to take away or alter powers already in existence, except

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[14] (1854) 17 Beav. 608.

[15] [1907] 2 K.B. 369.

[16] L.R. 8 C.P. 425.

[17] [1907] 2 K.B. 376.

"indeed by extending them. Let us now consider the state of "the law on this subject at the date of the coming into operation "of the Act of 1870. At that date agreements between a solicitor "and his client as to the terms on which the solicitor's business "was to be done were not necessarily unenforceable. They were, "however, viewed with great jealousy by the courts, because "they were agreements between a man and his legal adviser as "to the terms of the latter's remuneration, and there was so "great an opportunity for the exercise of undue influence, that "the courts were very slow to enforce such agreements where "they were favourable to the solicitor unless they were satisfied "that they were made under circumstances that precluded any "suspicion of an improper attempt on the solicitor's part to "benefit himself at his client's expense. But when it appeared "that the agreement was favourable to the client, the courts "often held the solicitor to his bargain, for there was no ground "in equity why they should be suspicious of a bargain of that "kind. Section 4, therefore, was not required for the purpose of "enabling persons to enter into these agreements, nor was it "required in order to strengthen the hands of the courts in their "examination of them. Before 1870 the court had full power "to investigate their propriety, and in my opinion the specific "provisions of section 4 did no more than provide and regulate "a procedure for the control of such agreements; they did not "in substance alter the law affecting them."

Buckley L.J. said [18]: "I agree. The jury has found as a fact "that the defendant verbally agreed with the plaintiff that, in the "event which has happened, he would make no charge against "the plaintiff for his costs. In order to succeed in this action, "the defendant must show that under the Act of 1870 he is not "bound by his bargain. The law in existence when the Act of "1870 was passed is clear; the solicitor could not charge his client "more than the amount of his bill of costs when taxed, and it "was his duty to advise his client that it was contrary to his "interest to pay more. Further, if there were an agreement "between them by which the client was to pay less, the solicitor, "being in a fiduciary relationship to him, owed the duty of "advising him that he ought not to enter into such an agreement "if other provisions in it were contrary to the client's interest. "The solicitor was under these disabilities when bargaining with "his own client, because it was his duty to guard him from acting

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[18] [1907] 2 K.B. 376, 378.

" in a way prejudicial to his interest. Then came the Act of 1870. " Its effect is as if it recited that the solicitor was under these " disabilities, and then enacted that, notwithstanding such " disabilities, he might make an agreement in writing with his " client as to his remuneration, provided he complied with the " requirements of the Act. The Act, when complied with, " relieved the solicitor of his disability. After the operative " words of section 4 come provisions by which certain benefits are " reserved to the client, such as the provision that in certain cases " the taxing officer must be satisfied that the agreement is fair " and reasonable, and must examine and allow it before it can be " put in force. The later provisions of the section in short cut " down the benefits given in the earlier part to the solicitor."

Buckley L.J. goes on to decide [19]: " Before the Act of 1870 " the solicitor was bound by such an agreement as the present " one; that Act was wanted, not for the protection of the client, " but for the benefit of the solicitor, in order to relieve him of " the disability with which he was affected. Section 4 does not " empower the client to do anything which he could not do before, " but does empower the solicitor, provided he complies with the " conditions imposed, to enter into a contract with his client " which, prior to that statute, he could not have entered into. " The solicitor here, as the jury found, has entered into a verbal " agreement to take remuneration at a less rate than he would " otherwise have been entitled to charge, and he cannot, I think, " set up the defence that the agreement is not binding upon him " because it is not in writing. I think, therefore, that the appeal " should be allowed and the judgment of the county court judge " restored."

There is also a case in 1910, *Gundry* v. *Sainsbury*,[20] but I do not think it adds anything material to the present question.

So one comes now to the Act under which the decision has to be given, namely, the Solicitors Act, 1932. That Act appears by its long title to be " An Act to consolidate the Solicitors Acts, " 1839 to 1928, and other enactments relating to solicitors of the " Supreme Court." It is not said to be an act to consolidate and amend previous acts, so one would therefore expect at any rate to find the same provisions as there were before. The question is whether under this Act in regard to non-contentious business an agreement to charge less or more than the scale fees in order to be effective must be in writing.

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[19] [1907] 2 K.B. 376, 379.

[20] [1910] 1 K.B. 645; 26 T.L.R. 321.

The sections dealing with non-contentious business are sections 56, 57 and to some extent section 58. Section 56 sets up a committee, just as a committee was set up under the Act of 1881, and provides in subsection (2): "The committee or any three of "them (the Lord Chancellor being one) may make general orders "prescribing and regulating in such manner as they think fit the "remuneration of solicitors in respect of non-contentious business "and may revoke or alter any such order."

Then there are similar provisions to those contained in the Act of 1881 as to the order being sent to the Law Society's Council and being laid before Parliament and as to what the order may contain, and so on.

Subsection (7) of section 56 is important. It provides: "As "long as any order under this section is in operation, the taxa- "tion of bills of costs of solicitors shall, subject to the provisions "of the next succeeding section with respect to agreements as "to remuneration, be regulated by that order." Therefore, when a bill of costs in regard to non-contentious business is being taxed, it must be taxed in accordance with the scale, subject only to the provisions of the next succeeding section with respect to agreements as to remuneration; so I think it must follow that if an agreement as to remuneration does not comply with the requirements of section 57, then it does not displace this provision in subsection (7) of section 56 that, subject to the provisions of the next succeeding section, the taxation of bills of costs shall be regulated by the order.

Section 57 provides: "(1) Whether or not any order is in "force under the last preceding section, a solicitor and his client "may, either before or after or in the course of the transaction "of any non-contentious business by the solicitor, make an "agreement as to the remuneration of the solicitor in respect "thereof."

Subsection (2) deals with the possible content of such an agreement. Then subsection (3) provides: "The agreement "shall be in writing and signed by the person to be bound "thereby or his agent in that behalf." Subsection (4) provides: "The agreement may be sued and recovered on or set aside in "the like manner and on the like grounds as an agreement not "relating to the remuneration of a solicitor."

I think that the scheme of that is perfectly plain. Under subsection (7) of section 56 the scale must be applied subject to the provisions of section 57, and the effect of subsection (3) of section 57 is that an agreement between a solicitor and his client with regard to the amount of charges must be in writing in order to have the effect which is referred to in section 57, that is to say, in order to displace the scale. The scale in the present case under consideration was not displaced, because no agreement in writing was made.

There remains section 59, dealing with contentious business, with which I am not concerned in this case. As this was merely a consolidating Act, and as the provisions of section 59 and the following sections are rather similar to those of the Act of 1870, it may be that the decisions in *Jennings* v. *Johnson* [21] and *Clare* v. *Joseph* [22] still hold good, or there may be some argument to the contrary. I do not have in this case to decide that. Even though it may be right to say that those decisions still hold good and that there are created or preserved the two anomalies or inequities to which I have referred, I agree with the argument that Mr. Wainstead puts forward, that, in spite of that, effect must be given to the plain words and the unmistakable meaning of the provisions of sections 56 and 57. It follows, therefore, that I agree with the master's answers and also with the reasons given by him, which are in my view upheld upon an examination of the relevant statutory provisions and the relevant decided cases. Therefore, this appeal must be dismissed.

*Appeal dismissed.*

J. D. P.

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[21] L.R. 8 C.P. 425.

[22] [1907] 2 K.B. 369.

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## REGINA *v.* ASHFORD, KENT, JUSTICES.
## *Ex parte* RICHLEY (No. 2).

C. A.

1955
*Nov.* 2, 3.

Singleton, Jenkins and Parker L.JJ.

*Crown Practice—Certiorari—Fraud, decision procured by—Bastardy —Affiliation order—Perjury by witness called by respondent— Whether certiorari will lie.*
*Bastardy.*

In affiliation proceedings, the alleged father called as a witness a man who, he understood, had associated with the mother of the child. In the witness box, however, the man denied having had sexual intercourse with the mother. The justices made an affiliation order. On appeal to the appeals committee the man refused

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to answer material questions. The committee dismissed the appeal. The man was subsequently tried for perjury and called the mother in support of his defence. He was convicted. The alleged father thereupon applied for an order of certiorari to quash the order of the justices on the ground that the order had been procured by fraud:—

*Held,* that the court, in the exercise of its discretionary jurisdiction, would not quash by certiorari an order of an inferior court on the ground of fraud unless the fraud was clear and manifest; in the present case, the court was not satisfied beyond doubt that if the mother had been tried for perjury it would have been proved by admissible evidence against her and, accordingly, the application would be refused.

Dictum in *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417, 450 applied.

*Rex* v. *Recorder of Leicester* [1947] K.B. 726; 63 T.L.R. 333; [1947] 1 All E.R. 928 and *Reg.* v. *Gillyard* (1848) 12 Q.B. 527 distinguished.

*Per* Jenkins L.J. Without attempting to lay down any general rule, I think that an order of certiorari to quash proceedings on the ground that they were procured by fraud or perjury should seldom if ever be made unless the facts regarding the alleged fraud or perjury have either been the subject of a conviction in regular criminal proceedings against the person to whom the fraud or perjury is imputed, or else have been admitted by something amounting to a confession by such person.

Decision of Divisional Court affirmed.

APPEAL from a Divisional Court.

On October 6, 1953, a child was born to Miss Pansy Patricia Mann. It was said that it was a late delivery and that the probable date of conception was about the end of December, 1952. Miss Mann took proceedings before the justices at Ashford, Kent, and on December 28, 1953, the justices adjudged that Peter Blair Richley, the proprietor of a taxicab business at Ashford, was the father of the child, and ordered him to pay certain sums by way of maintenance or support for it. Richley appealed against that order to the appeals committee of Kent Quarter Sessions, which, on March 1, 1954, dismissed the appeal. In the proceedings before the justices a man named Ricket, who had been in the employment of Richley as a driver, was called as a witness by Richley's counsel, he having apparently boasted of having had sexual intercourse with Miss Mann. In the witness-box, however, Ricket denied intercourse.

In October, 1954, an information was laid by Richley against Ricket, charging him with perjury, and on November 18 Ricket was committed for trial at the Maidstone Assizes. At the trial

Miss Mann gave evidence in support of Ricket's defence. Ricket was convicted of perjury and sentenced to 18 months' imprisonment. On April 27, 1955, Richley applied to the Divisional Court for an order of certiorari to bring up and quash the order of the Ashford justices. The Divisional Court refused the application and ordered Richley to pay the costs. Richley now appealed.

*Frank Whitworth* for Richley. If it appear to the court that the complainant in the affiliation case obtained judgment by any kind of fraud, then it should grant the order of certiorari without a conviction for perjury of the complainant: *Rex* v. *Recorder of Leicester.*[1] If the court is satisfied that there has been a miscarriage of justice an order of certiorari is the remedy. Once it has been established, by the conviction of Ricket, that there had been sexual intercourse between the woman and two men, it became impossible for the justices to put the paternity on one man. Perjury is a fraud upon the court, and on that ground alone the order of the justices may be quashed. If it had been possible to bring a charge of perjury against the woman, within the provisions of the Perjury Act, proceedings would no doubt have been taken against her, but this court is not concerned with the question whether there was evidence which would lead to her conviction. What the court must be satisfied with is that there has been perjury by somebody in proceedings which are wider than a purely civil matter between two parties.

[PARKER L.J. Does it follow from the fact that the jury disbelieved the evidence of the woman at Ricket's trial that this court must be satisfied that she was fraudulent before the justices? Are we entitled to substitute our finding for that of the justices?]

This court would not be substituting its finding for that of the justices. It is asked merely to set aside the order of the justices. The court, exercising its salutary jurisdiction, will, it is submitted, intervene where there has been fraud by a witness, irrespective of which of the parties has called him. On the evidence before the court the woman is not to be believed, and, quite apart from any difficulty which the court may feel as to whether the justices can be overruled, it should consider that the truth is established by the conviction of Ricket. [*Birch* v. *Birch*,[2] *Robinson* v. *Hutchinson*[3] and *Reg.* v. *Gillyard*[4] were also referred to.]

*John Gower* for Miss Mann. The decision in *Reg.* v. *Gillyard*[4] proceeded entirely on the basis that there was no answer to an affidavit alleging fraud and therefore the matter must be taken as pro confesso. The facts were not in dispute, and that case is distinguishable. It is true that there is not a great deal of authority on the exercise of the court's jurisdiction in this connexion, but all the cases show that the court does not exercise its jurisdiction except where the fraud is by one of the parties to the proceedings. In *Colonial Bank of Australasia* v. *Willan* [5] it was said by the Privy Council that the Court of Queen's Bench would not quash an order of an inferior court on the ground of fraud in the procuring of it unless the fraud were clear and manifest. It cannot be said that fraud on the part of Miss Mann has been established so as to be clear and manifest. Whatever the result of the prosecution against Ricket, it is not a matter which would be binding on this court so far as the action by Miss Mann against Richley is concerned. *Birch* v. *Birch* [6] affords no assistance in this case because the subject-matter of the proceedings were entirely different. This court ought not to have regard, in coming to its decision, to evidence which would not be evidence against Miss Mann in proceedings against her. The appellant is seeking to invite this court to hold that Miss Mann is a perjurer although he could never hope to establish that in a court of law.

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[1] [1947] 1 K.B. 726; 63 T.L.R. 333; [1947] 1 All E.R. 928.

[2] [1902] P. 130.

[3] 1935 S.C. 708.

[4] (1848) 12 Q.B. 527.

SINGLETON L.J. stated the facts and continued: When the hearing of the affiliation summons took place before the justices in December, 1953, evidence was given by Miss Mann, and witnesses were called on her behalf. Her father and her mother both gave evidence as to frequent visits by Richley to the house at which Miss Mann was living, and there were documents —a letter and a postcard—written by Richley which provided support for her case. Undoubtedly there was a case on which the justices might make an order, and there was sufficient corroboration for the purposes of the statute. Richley himself gave evidence, denying the evidence which had been given by Miss Mann; and there was called as a witness on his behalf the man Ricket. It is clear that Ricket, when he was called on behalf of Richley, was expected to say that he had had sexual intercourse with Miss Mann about the date of conception. In fact, his evidence was that he had driven Miss Mann in a taxicab occasionally, and that on one occasion he had had coffee and biscuits with her, but that that was the extent of his association with her. Whether the justices thought anything of his evidence or not, I do not know. When the case was before the appeals committee, Ricket was again called on behalf of Richley, and Ricket, having answered one or two questions of no materiality, declined to answer further questions. So that his evidence was of no use whatever to the appeals committee, who upheld the order of the justices.

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[5] (1874) L.R. 5 P.C. 417, 450.

[6] [1902] P. 130.

Some time later a police officer saw Ricket and made inquiries of him. Ricket gave an answer which was given in evidence by the police inspector on the trial of Ricket for perjury. The case developed in a somewhat extraordinary way. Richley gave evidence; several witnesses were called as to conversations with Ricket, evidence of a kind which clearly would not have been admissible against Miss Mann; and a police officer gave evidence to the effect that Ricket had admitted to him that he had had sexual intercourse with Miss Mann. There was a substantial case in support of the allegation that Ricket had committed perjury on the hearing before the Ashford justices. At the conclusion of the case for the prosecution, Ricket did not give evidence, but his counsel called Miss Mann into the witness-box and she gave evidence in support of Ricket's defence. I do not know how she came to be there, though I can well understand that she had an interest in the result of the case. We have been told that she was advised by counsel. She gave evidence to the effect that she had not had sexual intercourse with Ricket at any time; that it was not right to say that she had.

The issues which were before the jury were whether or not it was proved that Ricket had committed perjury on the occasion when he gave evidence, called as he was as a witness on behalf of Richley. Ricket had said first one thing and then another, and when he was on his trial for perjury, he did not go into the witness-box, but the girl was called in support of his case. She gave evidence which, it might be said, was in accord with the evidence which she had given before the justices on the first occasion, to the effect that she had not had sexual intercourse with Ricket. The jury convicted Ricket. It is not surprising that they did so, for he must have said to someone, before he was called as a witness at Ashford, that he had had sexual intercourse with the girl; else he would not have been called as a witness. When he was called as a witness, he said he had not had sexual intercourse with her. When he was seen by the police inspector, he said that he had. When he was on his trial on a charge of perjury, he did not give evidence. It is not surprising

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that this havering witness, who said first one thing and then another, but whose courage evaporated from time to time, was convicted of perjury.

Upon that conviction, and upon what took place at the trial, Mr. Whitworth on behalf of Richley based his application for an order of certiorari, and this appeal. He submitted to the court that the evidence proved by the conviction for perjury to have been false, and which was given by Ricket, showed that the order in favour of Miss Mann at Ashford was obtained by fraud; and, furthermore, that as Miss Mann's evidence before the justices and before the assize judge at Maidstone was to the same effect, this court ought to say that her evidence was proved to be untrue, and that she herself had been guilty of perjury. Thus he submitted that the order of the justices ought to be quashed, in that she must have been a party to the fraud as she had given false evidence herself.

The first question to be considered is: is it proved that her evidence was false? She has not been convicted of perjury. I am far from satisfied that if she had been prosecuted first she would have been convicted of perjury. Furthermore, I am not satisfied that if she were prosecuted now she would be convicted of perjury. Much of that which was given in evidence on the trial of Ricket would not be admissible against her. The fact that he had been convicted would not be admissible to prove her guilt. The evidence to secure her conviction would have to be evidence admissible against her, sufficient to prove that she had committed perjury. I am not sure that it can be said with any certainty that it follows either that she committed perjury, or that, if she was tried, she would be convicted of perjury.

In those circumstances it seems to me that this appeal is misconceived; but there are other questions to be considered. I do not know of any case in which an order made at the behest of one party has been quashed by reason of perjury committed by a witness called for the other party, who now seeks to have the order quashed. It would be going a long way if such a course was taken. Over and above that, though Mr. Whitworth only seeks to quash the order of the justices at Ashford, the case was considered by the appeals committee, who came to their decision in favour of Miss Mann without any material evidence from Ricket.

In the Divisional Court Lord Goddard C.J. said: "We are "really, in effect, being asked to say that we disbelieve Miss "Mann's evidence before the justices and, therefore, we are "going to quash this order. We cannot possibly say that. The "conviction of this man Ricket is no evidence against her. If "she is prosecuted for perjury now, she could not be convicted "merely by showing that Ricket had been convicted of perjury. "It would have to be proved to the satisfaction of the jury that "she had committed perjury, and I do not know whether a jury "would have been satisfied or not."

The cases to which we have been referred show that an order of this nature has been brought up and quashed in certain circumstances, and no one doubts that it can be done. The last is *Rex* v. *Recorder of Leicester*,[1] where the respondent in affiliation proceedings, against whom an order had been made by justices, appealed to quarter sessions. The appeal was heard by the recorder, who accepted the evidence of the respondent in regard to material facts and allowed the appeal. The respondent was subsequently, on his own confession, convicted of perjury in respect of the evidence given by him on his appeal. On an application for an order of certiorari to quash the order of the recorder allowing the appeal, on the ground that it had been obtained by fraud, it was held that certiorari would lie, and the order of the appeals committee in that case was quashed. So that the order in favour of the girl stood. There was no dispute as to the facts in that case. The party to the proceeding, the appellant against the original order, himself had committed perjury. He was fraudulent and he had succeeded on appeal by giving false evidence. In another case of the like kind, *Rex* v. *Recorder of Burnley, Ex parte Mousdale*,[2] the facts were somewhat similar.

In the present case I am left in uncertainty in that I do not know whether, if Miss Mann was prosecuted, a jury would be satisfied that she had committed perjury on her application to the Ashford justices. In the circumstances, we are asked to determine a question of fact which is in dispute. On the one side, Miss Mann obtained an order of the justices in her favour, and that order was upheld by the appeals committee. On the other side, Richley has denied throughout that he is the father of her child, and he has secured the conviction of one of his own witnesses for perjury committed on the hearing before the justices at Ashford. But there is a dispute whether or not she had had sexual intercourse with Ricket, or whether Ricket had

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[1] [1947] K.B. 726, 727.

[2] (1934) 98 J.P.N. 315.

had sexual intercourse with her. This court is asked to determine it. It is no part of the duty of this court so to do.

In *Reg.* v. *Gillyard*[3] the first judgment of the court was given by Lord Denman C.J., who held that the court had jurisdiction. Coleridge J., who gave the second judgment, was of the same opinion. He said[3]: "This is a rule for quashing a "conviction: and we make the rule absolute on the ground "that this conviction has been a fraud and mockery, the result "of conspiracy and subornation of perjury. When the court "observes such dishonest practices, it will interfere, although "judgment has been given. The case involves the jurisdiction "of this court as a court of control over all inferior courts. "It is said that conspiracy is charged, and that the party charged "ought not to be expected to answer upon affidavit. I think no "honest man ought to think it beneath him, or a hardship upon "him, to answer upon affidavit a charge of dishonesty made upon "affidavit against him. If a man, when such a serious accusa"tion is preferred against him, will not deny it, he must not "complain if the case is taken pro confesso."

The court in that case was not faced with the determination of a question of fact. There was no dispute upon the evidence before the court. There was, according to the judgment of Coleridge J., a conviction which had been obtained by fraud and mockery, the result of conspiracy and subornation of perjury. Nothing of that kind has been alleged in this court. It has not been submitted that there was a conspiracy between Ricket and Miss Mann, or that there was subornation of perjury. There is a great difference between that case and the present case. Erle J. said[4]: "I am of the same opinion. This court has authority to "correct all irregularities in the proceedings of inferior tribunals, "which in this case have been resorted to for the purpose of "fraud. In quashing this conviction, we are exercising the most "salutary jurisdiction which this court can exercise."

I repeat that there was not only the order of the justices at Ashford, but there was also the order of the appeals committee, which had not any material evidence of Ricket before it. There is no certainty what the position would have been if Ricket had given evidence of a different character, but that is by the way.

We have not been referred to any case in which the Divisional Court has decided a question of fact of this kind so as to grant an order of certiorari when the facts are disputed. In *Colonial*

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[3] (1848) 12 Q.B. 527, 530.

[4] Ibid.

*Bank of Australasia* v. *Willan*,[5] a case in the Privy Council, these words were used and they apply to this case: "The Court of "Queen's Bench, whose exercise of this jurisdiction is discretionary, would certainly not quash an order of an inferior court "upon the ground of fraud in the procuring of it, unless the "fraud were clear and manifest." In view of the dispute which there is upon the facts of this case, I fail to see that there is shown fraud which is clear and manifest. The very fact that the person who has been convicted of perjury was a witness for Richley himself, who now seeks to attack the order of the justices, makes the position quite unusual.

The remedy by way of certiorari is a valuable remedy. No court has a right to extend it. It should seldom be invoked in a case such as this where there is a real dispute as to the facts. This is not an appeal from the decision of the justices of the Ashford Division; nor is it possible to order a rehearing. It was open to Richley, if he so desired, to launch proceedings for perjury against Miss Mann. I said to Mr. Whitworth: "That "might have been done," and he used these words: "Yes, if I "could establish it." I believe that to be the answer to this case. This court ought not to grant an order of certiorari merely because a witness—particularly a witness called for the side seeking the order—has committed perjury. The fact that Ricket was convicted does not establish guilt on the part of Miss Mann; and unless she committed perjury or was in some way or other a party to fraud, the application for an order of certiorari ought not to succeed. For those reasons, I am of opinion that this appeal should be dismissed.

Jenkins L.J. I agree. Richley claimed that the affiliation order made against him on December 29, 1953, was procured by fraud in the shape of the perjured evidence of Miss Mann, and of Richley's own witness, Ricket, and that, consequently, the order of certiorari should issue in accordance with the principles stated in *Rex* v. *Recorder of Leicester*.[6]

The argument in support of the appeal is, in effect, put in two ways. First, it is said that the giving of evidence by Ricket before the justices to the effect that he had never had sexual intercourse with Miss Mann in itself, once it was held to have been untrue by his conviction for perjury, vitiated the proceedings before the justices, and amounted to a procuring of the affiliation order by perjury. The second branch of the argument is that, in the light of subsequent events, in the shape of the conviction of Ricket for perjury by a jury which had heard the evidence of Miss Mann in Ricket's defence, the evidence given by Miss Mann before the justices was demonstrably false so far as it denied intercourse between herself and Ricket, and that she procured the affiliation order by means of this false evidence.

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[5] L.R. 5 P.C. 417, 450.

[6] [1947] K.B. 726.

I find myself unable to accept either branch of the argument. First, as to the direct effect of Ricket's evidence before the justices, I find it impossible to hold that this amounted to a procuring of the affiliation order by Miss Mann by means of perjured evidence. The witness was Richley's witness and not Miss Mann's witness. She had no control over the evidence that Richley might or might not wish to call. For the purpose of testing this branch of the argument, one must assume that she herself was an honest witness. It seems to me impossible to hold that, where a claimant gives honest evidence in support of his or her claim and the claim is held established by the court, it should be possible for the defendant to contend that the proceedings are invalidated by some untrue evidence tending to support the claimant's case, put forward by the defendant himself. Secondly, I cannot be satisfied that if Ricket had given evidence before the justices to the effect that he had had sexual intercourse with Miss Mann, the result before them would have been any different. The result might well have been that they would have believed Miss Mann and rejected the evidence of Ricket.

Finally, on this branch of the argument, it seems to me that whatever effect is to be attributed to Ricket's evidence as given before the justices in the first instance, and even if it can be said that it did amount at that stage to a procuring of the order by perjured evidence, the vitiating effect of that evidence can hardly be taken to have survived the hearing before the appeals committee, for at the hearing before the committee, as my Lord has said, Ricket, after answering certain questions, declined to answer one way or the other further questions bearing upon the suggestion of his having had intercourse with Miss Mann.

Accordingly, I reject the first branch of the argument. The second branch of it seems to me to be a more formidable one. It is said that Ricket was charged with and convicted of perjury for giving evidence to the effect that he had never had sexual intercourse with Miss Mann. It is said truly that the verdict against him was obtained in proceedings in which Miss Mann herself gave evidence on his behalf to the effect that he never had had intercourse with her. It is said that, in those circumstances, the evidence of Miss Mann cannot be anything else than false, and, accordingly, it is said that from beginning to end the proceedings were vitiated by reason of the fact that first the order of the justices, and then the order of the appeals committee, were procured by Miss Mann's own perjury.

That, as I have said, seems to me to be the more formidable branch of the argument, but in my view it should not prevail. In my judgment, it should not be assumed, for the purposes of the jurisdiction we are now being asked to exercise, that if Miss Mann had been prosecuted for perjury, her prosecution would have led to a conviction. Much of the evidence on the strength of which Ricket was convicted was wholly inadmissible against Miss Mann. For example, his statements to the police, his lying stories about how he had spent the night of December 28, 1952, his boastful talk to his fellow workmen—none of these matters would have been admissible against Miss Mann at all in any proceedings for perjury that might have been brought against her.

Mr. Whitworth contended that, for the present purpose, the court should be content with something less than the evidence that would be necessary to secure a conviction for perjury against Miss Mann. I accept that argument to the limited extent that it might be superfluous for the court to insist on all the technicalities of a prosecution of this sort as regards proof being satisfied, but to my mind, at all events, the court must be satisfied, beyond a peradventure, that if the issue whether Miss Mann had committed perjury or not had come to be tried, it would have been proved, by evidence wholly admissible against her, that she had given the false evidence in question. I would add that, in my view, the court should not, in exercising this jurisdiction, weigh one set of alleged facts against another. If such a weighing of facts is necessary, I think that demonstrates that the case is not a proper one for the exercise of the jurisdiction.

I would not attempt to state exhaustively the requirements that should be insisted on as regards the state of the facts underlying an application of this sort, but, without attempting to lay down any general rule, I venture to say that I think an order of certiorari to quash proceedings on the ground that they were procured by fraud or perjury should seldom if ever be made unless the facts regarding the alleged fraud or perjury have either been the subject of a conviction in regular criminal proceedings against the person to whom the fraud or perjury is imputed, or else have been admitted by something amounting to a confession by such person. In the present case, neither of these conditions is satisfied, and it is by no means clear to me that the charge of giving false evidence has been brought home against Miss Mann.

Bearing in mind the passage quoted by my Lord from the *Colonial Bank of Australasia* case,[7] I cannot hold that the fraud here alleged is sufficiently clear and manifest to warrant the court exercising this discretionary jurisdiction. Accordingly, for the reasons I have endeavoured to state, and those given by my Lord, I agree that this appeal fails and should be dismissed.

PARKER L.J. I agree, and I would only add a few words in deference to Mr. Whitworth's able argument. It is, I think, important to remember that the supervisory jurisdiction of the High Court, exercised originally by way of a writ of certiorari and now by an order of certiorari, does not extend to the curing of all alleged irregularities in an inferior court. As Lord Goddard C.J. said in the *Recorder of Leicester* case,[8] to which my Lord has referred, "Certiorari is a remedy of a peculiar character and "there is a great deal of authority as to when it will and it will "not lie." But, in general, this valuable jurisdiction is exercised along well-defined lines, such as lack of jurisdiction and matters akin to lack of jurisdiction and errors of law appearing on the face of the record. The one thing, however, that must be borne in mind is that the jurisdiction is never exercised by way of appeal.

It has for long been recognized, however, that it is a ground for quashing the decision of an inferior court if the decision has been obtained by the fraud or on the perjured evidence of the person invoking the jurisdiction of the court, either originally, as in *Gillyard's* case,[9] or by way of appeal, as in the *Recorder of Leicester* case.[10] It may be—and this view was expressed by the Lord Chief Justice in the *Recorder of Leicester* case [10]—that it may also extend to perjury committed by the other party; not the party seeking relief, but the party who has been brought before the court. But one thing is clear, and that is that there is no case to which counsel have been able to refer us in which certiorari has lain where the fraud or perjured evidence is that of a witness called by one of the parties, unless, of course, it is also shown that that perjured evidence was given in collusion with one of the parties. That, indeed, was the position in the *Recorder of Burnley* case,[11] where one of the witnesses called by the appellant on appeal was shown to have committed perjury, but to have committed it in collusion with the appellant.

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[7] L.R. 5 P.C. 417, 450.

[8] [1947] K.B. 726, 727.

[9] 12 Q.B. 527.

[10] [1947] K.B. 726.

I see no ground, at this date, for extending the jurisdiction any further. Apart from that, it is, in my view, very relevant in the present case to realize that Ricket gave no evidence on the vital matter before the appeals committee. It cannot, accordingly, be said that the decision on appeal, an appeal which was by way of rehearing, was itself affected by any fraud or perjured evidence on the part of Ricket.

That disposes of Mr. Whitworth's first line of argument. Secondly, however, he says that in the present case the true implication is that the person who invoked the jurisdiction of the court, namely, Miss Mann herself, was fraudulent in that, on oath before the justices, she wilfully gave false evidence. She has not been convicted of perjury and she has not confessed perjury, but, nevertheless, says Mr. Whitworth, she must have been guilty of perjury since quite plainly the jury, in convicting Ricket, must have disbelieved her evidence.

The question, as it seems to me, is: is that sufficient proof of fraud to enable this court to quash the decision? The fraud must be clear and manifest, as appears from the passage from Sir James Colvile giving the judgment of the Board in the *Colonial Bank of Australasia* case.[12] If conviction is proved, then, of course, it is not for this court to say that the jury were wrong, but in the present case Miss Mann has not been convicted, and as Lord Goddard C.J. said in the Divisional Court: "But it is "still open to Miss Mann to say: 'I have never committed per-"'jury; I have never been convicted. I gave evidence at this "'man's conviction, but I have not been convicted'; and it is "necessary to emphasize that this court does not sit as a court "of appeal."

What evidence is sufficient to enable this court to quash a decision of this kind it is unnecessary to say, but I conceive that, in the case of a voluntary confession, this court would interfere; and, indeed, as it seems to me, that in effect was the position in *Gillyard's* case.[13] In that case affidavit evidence was produced of fraud and collusion, and though an opportunity was given to answer the charge made on affidavit, the respondent failed to do

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[11] 98 J.P.N. 315.

[12] L.R. 5 P.C. 417, 450.

[13] 12 Q.B. 527.

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Parker L.J.

so. Coleridge J. said, in those circumstances[14]: "If a man, "when such a serious accusation is preferred against him, will "not deny it, he must not complain if the case is taken pro "confesso." To go further in the present case and to say that, on the evidence available here, it is shown that Miss Mann wilfully gave false evidence before the justices seems to me to be substituting the view of this court as to the credibility of Miss Mann for the view of the justices, a matter which is the one thing that this court cannot do. I would dismiss the appeal.

*Appeal dismissed.*
*Leave to appeal to the House of Lords refused.*

Solicitors: *Kingsford, Dorman & Co. for Kingsford, Flower & Pain, Ashford; Lovell, Son & Pitfield for W. Taylor & Co., Ashford.*

A. W. G.

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[14] 12 Q.B. 527, 530.

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1955
*Oct.* 11, 12;
*Nov.* 2.

Sellers J.

## F. W. BERK & CO. LTD. *v.* STYLE.

*Insurance—Marine—Cargo—"Inherent vice"—"All risks from whatsoever cause arising"—Institute Cargo Clauses (Wartime Extension), cl.* 6—*Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 55 (2) (*c*).

*Contract—Construction—Repugnancy.*

The plaintiffs incurred considerable expense in and about the rebagging and landing of a cargo of kieselguhr which had been shipped from North Africa to London, because the cargo arrived in a damaged condition due to the bursting of the bags in which it was carried, because of their inherent vice. The cargo was covered in transit by two policies of marine insurance against "all "risks of loss and/or damage from whatsoever cause arising." Clause 6 of the Institute Cargo Clauses (Wartime Extension), which was attached to and formed part of the policies of insurance, provided: "This insurance shall in no case be deemed to extend to "cover loss damage or expense proximately caused by delay or "inherent vice or nature of the subject-matter insured," and

[Reported by G. D. Black, Esq., Barrister-at-Law.]

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section 55 (2) (*c*) of the Marine Insurance Act, 1906, provides: "Unless the policy otherwise provides, the insurer is not liable "for ordinary wear and tear, ordinary leakage and breakage, "inherent vice or nature of the subject-matter insured":—

*Held*, that clause 6 of the Institute Cargo Clauses (Wartime Extension) restricted the scope of the clause covering "all risks of "loss and/or damage from whatsoever cause arising" and excluded damage due to inherent vice; accordingly the underwriters were not liable upon the policy.

Dicta of Lord Birkenhead L.C. and Lord Sumner in *British and Foreign Marine Insurance Co. Ltd.* v. *Gaunt* [1921] 2 A.C. 41, 46, 57; 37 T.L.R. 632 applied.

Action.

On June 5, 1951, the plaintiffs sent 100 tons of kieselguhr, valued at £1,546, on a voyage by the S.S. *Rijeka* from Mostaganes, in North Africa, to London. The vessel arrived in London on June 12, 1951, and it was discovered that large numbers of the bags in which the kieselguhr was packaged were torn and broken, and that a quantity of the kieselguhr was loose. The plaintiffs were put to considerable expense in rebagging and relanding the goods, and claimed in respect thereof under two policies of insurance. The underwriters alleged that the bags tended to open at the seams when handled and were of insufficient strength to withstand the ordinary incidents of the shipment and of normal handling.

The goods were covered in transit by two policies of marine insurance dated April 13, 1951, and May 8, 1951, and subscribed by the defendant and others, and by a declaration under each policy. In consideration of a premium paid by the plaintiffs the underwriters had agreed to insure the kieselguhr against "all risks "of loss and/or damage from whatsoever cause arising irrespective of percentage." Each policy also provided "in case of "any loss or misfortune it shall be lawful to the assured . . . to "sue labour and travel for, in and about the defence, safeguard "and recovery of the said goods and merchandises and ship . . . "or any part thereof, without prejudice to this insurance; to the "charges whereof we, the assurers, will contribute, each one "according to the rate and quantity of his sum herein insured."

The underwriters denied liability, alleged that the damage was caused by inherent vice in the goods, and relied upon clause 6 of

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[1] Institute Cargo Clauses (Wartime Extension): "This insurance "shall in no case be deemed to "extend to cover loss or damage or "expense proximately caused by delay "or inherent vice or nature of the "subject matter insured."

the Institute Cargo Clauses (Wartime Extension),[1] which was attached to and formed part of the contract of insurance, and section 55 (2) (*c*) of the Marine Insurance Act, 1906.[2]

Sellers J. held, upon the evidence, that there was inherent vice in the goods which caused the damage.

*Michael Kerr* for the underwriters. An "all risks" policy does not cover damage caused by inherent vice: *British and Foreign Marine Insurance Co. Ltd.* v. *Gaunt.*[3] Further, there appears to be no case in which any policy has been held to cover inherent vice; the nearest, perhaps, is *E. D. Sassoon & Co. Ltd.* v. *Yorkshire Insurance Co.*,[4] but it was there found as a fact that there was no inherent vice.

[Sellers J. If a policy is specific enough it can cover damage due to inherent vice.]

Yes. The words in this policy are "from whatsoever cause "arising," and other policies with similar wording have been held not to cover inherent vice: *British and Foreign Marine Insurance Co. Ltd.* v. *Gaunt*[5] and *Theodorou* v. *Chester.*[6] The important word is "risk." This policy insures against risks and not against certainties, but the essence of inherent vice is that it is a certainty. If insurance for damage due to inherent vice is required far wider overriding words than "from any cause what-"soever" are needed. The onus of proof is on the plaintiffs to show that inherent vice is included: *Gaunt's* case[7] and *Sassoon's* case.[8] See also *Theodorou* v. *Chester.*[9] On the facts the damage sustained was due to the faulty condition of the bags and the underwriters are not liable therefor. [Reference was also made to *London and North Western Railway Co.* v. *Hudson (Richard) & Sons Ltd.*[10] and *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.*[11]]

*Eustace Roskill Q.C.* and *Clement Bailhache* for the plaintiffs. The parties have by clear wording, specially typed, used language showing that they intended to cover any kind of damage. "All

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[2] Marine Insurance Act, 1906, s. 55 (2) (*c*): "Unless the policy "otherwise provides, the insurer is "not liable for ordinary wear and "tear, ordinary leakage and breakage, "inherent vice or nature of the "subject matter insured . . ."

[3] [1921] 2 A.C. 41, 46, 51; 37 T.L.R. 632.

[4] (1923) 16 Ll.L.Rep. 129.

[5] [1921] 2 A.C. 41.

[6] [1951] 1 Ll.Rep. 204.

[7] [1921] 2 A.C. 41, 57.

[8] 16 Ll.L.Rep. 129, 130 et seq.

[9] [1951] 1 Ll.Rep. 204, 238.

[10] [1920] A.C. 324.

[11] [1918] A.C. 350; 34 T.L.R. 221.

"risks" is simply shorthand for every type of damage that might arise. "From whatsoever cause arising" cannot be meaningless and must have been intended to widen the scope of the cover, and Atkin L.J. in *Sassoon's* case[12] showed clearly that there could be a policy which covered inherent vice, though that is admittedly obiter.

[Sellers J. If the parties had wished to cover damage from inherent vice they could have said so expressly.]

Yes. But in this case there is the same distinction as was drawn by the Court of Appeal in *Travers (Joseph) & Sons Ltd.* v. *Cooper*[13] and *Gaunt's* case,[14] in which Lord Birkenhead L.C. said: "These words cannot, of course, be held to cover all "damage however caused." The implication is that if the words "however caused" are used then the policy would cover inherent vice. Further, there is a decision of Bailhache J. in *Dodwell & Co. Ltd.* v. *British Dominions General Insurance Co. Ltd.*[15] which is an example of the type of wording envisaged by Atkin L.J. in *Sassoon's* case.[16] The words there used were "risk of "leakage from any cause whatever." The present policy therefore covers inherent vice should that be the cause of the damage.

The onus is on the underwriters, and Croom-Johnson J. was wrong in *Theodorou* v. *Chester*[17] on this point. In an "all risks" policy the assured has simply to show a fortuitous happening and not how or why it occurred. Here the fortuitous happening was the breaking of the bags, which is all the plaintiffs need prove.

*Cur. adv. vult.*

Nov. 2. Sellers J. stated the facts, and continued: In my judgment, the evidence has established, in the language used in marine insurance, "inherent vice" in the goods insured, and it was this circumstance (that is, the faulty bags) which brought about the special expenditure of and occasioned by the rebagging on the lighter.

The question of law which has arisen is whether on this finding the plaintiffs can recover under the policies on which they claim. The underwriters relied on clause 6 of the Institute Cargo Clauses (Wartime Extension), and section 55 (2) (*c*) of the Marine Insurance Act, 1906. In *British and Foreign Marine*

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[12] 16 Ll.L.Rep. 129, 133.

[13] [1915] 1 K.B. 73; 30 T.L.R. 703.

[14] [1921] 2 A.C. 41, 46.

[15] Ll.L.Newsp., April 9, 1918.

[16] 16 Ll.L.Rep. 129, 133.

[17] [1951] 1 Ll.Rep. 204.

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F. W. Berk & Co. Ltd. v. Style.

Sellers J.

*Insurance Co. Ltd.* v. *Gaunt* [1] the policy sued on covered risks "Including all risk of craft, fire, coasters, hulks, transhipment "and inland carriage by land and/or water, and/or risks from the "sheep's back and/or stations while awaiting shipment and/or "forwarding and until safely delivered into warehouse in Europe "with liberties as per bills of lading." The subject-matter of the insurance was wool produced in Patagonia to be delivered in bales f.o.b. an ocean steamer at Punta Arenas, a port in Chile. Lord Birkenhead L.C. said, in relation to that cover [2]: "In "construing these policies it is important to bear in mind that "they cover 'all risk.' These words cannot, of course, be held "to cover all damage however caused, for such damage as is "inevitable from ordinary wear and tear and inevitable deprecia- "tion is not within the policies. There is little authority on the "point, but the decision of Walton J. in *Schloss Brothers* v. "*Stevens*,[3] on a policy in similar terms, states the law accurately "enough. He said that the words 'all risks by land and water' "as used in the policy then in question 'were intended to cover "'all losses by any accidental cause of any kind occurring during "'the transit. . . . There must be a casualty.' Damage, in "other words, if it is to be covered by policies such as these, "must be due to some fortuitous circumstance or casualty." I quote also the oft-quoted words of Lord Sumner [4]: "There are, "of course, limits to 'all risks.' They are risks and risks insured "against. Accordingly, the expression does not cover inherent "vice or mere wear and tear or British capture. It covers a "risk, not a certainty; it is something, which happens to the "subject-matter from without, not the natural behaviour of "that subject-matter, being what it is, in the circumstances "under which it is carried. Nor is it a loss which the assured "brings about by his own act, for then he has not merely "exposed the goods to the chance of injury, he has injured them "himself." In that case the claim against the underwriters succeeded because, on the facts, the plaintiff proved some casualty or accidental circumstances insured against.

The defendant's contention was that the decision in *Gaunt's* case was wholly against the plaintiffs' contention and defeated the claim, as it established that under an "all risks" policy an insured must prove that the loss was due to an accident, or that an apprehended loss which justified expenditure to avert it was due to an accident or casualty in the course of the adventure, and here the facts have shown "inherent vice" and no accident or casualty.

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[1] [1921] 2 A.C. 41; 37 T.L.R. 632.

[2] [1921] 2 A.C. 41, 46.

[3] [1906] 2 K.B. 665; 22 T.L.R. 774.

[4] [1921] 2 A.C. 41, 57.

In *E. D. Sassoon & Co. Ltd.* v. *Yorkshire Insurance Co.*[5] Atkin L.J. said: "I think it is quite plain from the words of the Marine "Insurance Act, section 55 (2) (*c*), that a policy may provide, "if it is done in express words, for the insurer being liable for "losses which are excepted, the ordinary wear and tear, ordinary "leakage and breakage and inherent vice from the nature of the "subject-matter insured. The particular kind of loss, the "amount of the loss, is one which, within the words of Lord "Sterndale, is a loss that may or may not happen, and not one "which certainly must happen; if it was a loss which certainly "must happen within the voyage I doubt whether it could ever "be made properly the subject-matter of a policy insurance." It was submitted that the policies here sued on did cover loss or damage by inherent vice; that they were in different terms from the material terms in *Gaunt's* case[6]; that section 55 (2) (*c*) only applies "unless the policy otherwise provides"; and that the policies themselves expressly in typescript state that the policies are to cover all risks of loss "and/or damage from whatsoever "cause arising as far as applying including the Wartime Extension Clauses"; and it was submitted, therefore, that neither the exception in section 55 that the insurer is not liable for inherent vice or nature of the subject-matter insured nor the exception in clause 6 is applicable. The policy, it was argued, covered all risks however caused, and that would include the bursting or opening of bags, however caused, and any spillage or loss caused by the bursting or opening of the bags in the course of transit: the plaintiffs were buyers f.o.b. and had no control over the bags used, or the shipment or stowage, or the handling of the goods at any time.

The words of these policies, "from whatsoever cause arising," are wider than the "all risks" clause in *Gaunt's* case,[7] concerning which Lord Birkenhead said that they could not be held to cover all damage however caused, for such damage as was inevitable from ordinary wear and tear and inevitable depreciation was not within the policies.

Mr. Roskill, as a result of commendable resource or research, produced a decision of Bailhache J., *Dodwell & Co. Ltd.* v. *British Dominions General Insurance Co. Ltd.*[8] The plaintiffs were importers of two shipments of barrels of oil carried from Hankow, including transhipment at Shanghai, to this country. In the transit in 1916, in wartime, there was a very serious and abnormal leakage of oil from the barrels. Apparently heat on the voyage had caused the staves of the barrels to shrink and so loosened the hoops, and this had been accentuated by a prolonged voyage and perhaps bad stowage. The two policies sued on covered all risks, that is to say, war risks, general marine risks, and particularly leakage. The claim was contested by underwriters on the ground of non-disclosure at the time of entering into the policies. Bailhache J. found against this contention, and found for the plaintiffs for the loss occasioned by the leakage, in so far as it was in excess of the ordinary leakage under one policy, but in the other the underwriters had used the words "including "risk of leakage from any cause whatever," and the judge held them bound by their own expression and held that the words "clearly included all leaking to which these barrels of oil were "subjected"; and in this case the underwriters had to pay for the whole of the leakage proved. The case, it would seem, is an illustration of what Atkin L.J. stated in *Sassoon's* case[9] as possible, namely, that a policy may provide, if it is done in express words, for the insurer to be made liable for loss and damage which are excepted by section 55, for example, for inherent vice.

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[5] (1923) 16 Ll.L.Rep. 129, 133.

[6] [1921] 2 A.C. 41.

[7] Ibid.

*London and Provincial Leather Processes Ltd.* v. *Hudson*[10] is an interesting case in which Goddard L.J. found the underwriters liable under a policy "against all and every risk whatsoever, "however arising" in respect of skins which had been detained by sub-contractors in purported exercise of a general lien for money owing to them from the person to whom the plaintiffs, had in the first place, entrusted the skins.

But I do not think that these authorities help the plaintiffs. Clause 6 remains part of the policy, and it is in emphatic terms: "This insurance shall in no case be deemed to extend to cover "loss, damage or expense proximately caused by inherent vice." This clause restricts the scope of the clause covering all risks of damage "from whatsoever cause arising," but it is not wholly repugnant to it. Having regard to the established law in the matter, if the plaintiffs had wished to insure against inherent vice—if, indeed, they could have done so at any reasonable premium—they should have used specific words to that effect, or at least have had clause 6 or the relevant part of it struck out.

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[8] Ll.L.Newsp., April 9, 1918.

[9] (1923) 16 Ll.L.Rep. 129.

[10] [1939] 2 K.B. 724; 55 T.L.R. 1047; [1939] 3 All E.R. 857.

*Gaunt's* case [11] establishes that the plaintiff in such a case as this must prove that the loss or expense, or the "suing and "labouring," was due to an accident or casualty, although not necessarily to prove the exact nature of the accident or casualty. I cannot find that there was any accident or casualty. As Lord Sumner pointed out, the policy covers a risk, not a certainty. With the bags in the condition in which these bags must have been, it could be said to be certain that they would not hold their contents in the course of necessary handling and transport; and if at the end of the sea voyage it was desired to have the kieselguhr in bags it would be necessary to rebag it. If the underwriters were to be held liable they would be paying for the cost at the time and place of discharge of putting the goods into bags in the condition in which they ought to have been, but were not, on shipment. Such cost clearly does not fall within the terms of these two policies of marine insurance, and in my opinion, the claim fails.

*Judgment for the defendant.*

Solicitors: *Ince & Co.; William A. Crump & Son.*

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[11] [1921] 2 A.C. 41.

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## BURNELL v. BRITISH TRANSPORT COMMISSION.

C. A.
1955
Nov. 30;
Dec. 1.

Denning, Hodson and Morris L.JJ.

*Evidence—Cross-examination—Privileged statement—Previous signed statement made by witness—Witness cross-examined on parts of statement—Witness not contradicting parts of statement put to him—Whether privilege waived by cross-examination.*

In an action by a plaintiff against his employers for damages for personal injuries, a witness for the plaintiff was cross-examined as to whether he had said $x$ and $y$ in a previous statement made and signed by him; the witness agreed that he had. Counsel for the plaintiff thereupon asked that the whole statement should be produced, but cross-examining counsel objected that so long as the witness had not denied what had been put to him from the statement, it remained a privileged document:—

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*Held*, that the whole document was admissible, for cross-examining counsel, by using parts of the previously privileged statement, had waived the privilege, not only as to part but as to the whole of the statement.

*North Australian Territory Co.* v. *Goldsborough, Mort & Co.* [1893] 2 Ch. 381 distinguished.

Ruling of Sellers J. affirmed.

APPEAL from Sellers J.

During the hearing of an action by a plaintiff for damages for personal injuries sustained by him in the course of his employment by the British Transport Commission, a witness for the plaintiff, one Anzani, was being cross-examined by counsel for the commission. Counsel had in his hand a written statement, and asked the witness whether he had given a statement to the commission before the hearing and had signed it. The witness agreed that he had. Counsel then asked him whether he had said $x$ and $y$ in the statement, and the witness agreed that he had. Counsel for the plaintiff thereupon asked that the whole statement should be produced; but counsel for the commission objected that as the witness had not denied what had been put to him from the statement, it remained a privileged document and need not be produced or put in evidence.

Sellers J. ruled that as the witness had been referred to the signed statement in cross-examination, the plaintiff's counsel was entitled to see the whole document if he wished to do so. Counsel for the plaintiff thereupon called for production of the document, and it was put in evidence, the judge ruling that it was admissible.

Sellers J. gave judgment for the defendants in the action, and the plaintiff appealed. The transcript of the evidence, including the cross-examination on the statement and the judge's ruling that it was admissible in evidence as a whole, was read to the Court of Appeal.

[The appeal is reported only on the question of evidence.]

*Norman Richards Q.C.* and *Geoffrey Howe* for the commission. The judge ought not to have allowed the signed statement to be admitted as evidence or made available to the other side, for the statement was privileged, just as is a proof of evidence—which in effect it was—and the privilege had not been waived. Counsel is entitled to cross-examine a witness on any part of a previous statement made by him, and so long as the witness assents to those parts of his previous statement which are put to him, cross-examining counsel is not required to put in the statement as a whole. It is only if the witness under cross-examination contradicts his previous answers that cross-examining counsel can be required to produce the whole statement and put it in evidence. That is the effect of *North Australian Territory Co.* v. *Goldsborough, Mort & Co.*,[1] where a witness, who had made a deposition in an examination under section 115 of the Companies Act, 1862, was cross-examined under commission as to the truth of certain of his answers in his deposition and did not contradict his previous answers. Lord Esher [2] said that if the witness had contradicted his previous answers, then the whole document which was being used to contradict him must be put in evidence; but it was held that the defendants in that case were not entitled to see the depositions.

[MORRIS L.J. May not that case be governed by the fact that the previous statement was a deposition made under section 115 of the Companies Act, 1862, and subject to considerable restrictions as to its admissibility in evidence: see Buckley on Companies (12th ed., at p. 564) that "depositions taken" (under section 268 of the Companies Act, 1948) "may be read "against the deponent as admissions; but, *semble*, notice should "be given of the intention to read them. They are not evidence, "and cannot be read against anyone else." Does anything turn on that rule?]

No; the matter is of general application, and rests on the fact that privilege is not waived in respect of the statement so long as the witness agrees. For practical purposes the position is similar to that in which counsel memorizes the words of a previous statement and puts them to the witness without referring to the written statement at all.

*H. I. Nelson Q.C.* and *D. Meurig Evans* for the plaintiff. It has long been established practice that if one side has a signed statement from a witness one is not obliged to put it to him in any form. He may be cross-examined about the information in it so long as there is no suggestion that the written statement is being put to him; but once counsel has cross-examined the witness and made it clear that it is cross-examination on a part of a previous statement by him, the whole statement must be put in so that counsel who called the witness may re-examine him on it. *Goldsborough's* case is distinguishable, for depositions under section 115 of the Act of 1862 were subject to special provisions which prevented their being used for any but certain purposes.

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[1] [1893] 2 Ch. 381.

[2] Ibid. 385.

[MORRIS L.J. That practice seems to be borne out by what is said in Taylor on Evidence, 12th ed., at p. 925, that "if "cross-examining counsel, after putting a paper into the hands "of a witness, merely asks him some question as to its general "nature or identity, his adversary will have no right to see the "document, but, if the paper be used to refresh the memory of "a witness, or if any questions be put respecting its contents . . . "a sight of the document may then be demanded by the "opposite counsel."]

DENNING L.J. stated the facts and continued: The question for this court (and the question which Sellers J. had to decide) is whether, in those circumstances, the examining counsel had a right to call for the statement and to insist on it being put in evidence. Sellers J. ruled that he had that right. It seems to me that the judge was correct, because although this statement may well have been privileged from production and discovery in the hands of the Transport Commission at one stage, nevertheless when it was used by cross-examining counsel in this way, he waived the privilege, certainly for that part which was used; and in a case of this kind, if the privilege is waived as to the part, it must, I think, be waived also as to the whole. It would be most unfair that cross-examining counsel should use part of the document which was to his advantage and not allow anyone, not even the judge or the opposing counsel, a sight of the rest of the document, much of which might have been against him. It seems to me that the ruling of Sellers J. was correct. It was in accordance with the practice as I have always understood it.

I would like to add that, since the Evidence Act, 1938, the document, once it was legitimately in the presence of the court, would be admissible as evidence under that Act also. I think, therefore, that we should look at the document, just as the judge did.

HODSON L.J. I agree on the question of waiver and on the question of privilege. I only add this, that there is no suggestion in this case that anything unfair was done or sought to be done. A stand has been taken on a question of principle, as it was thought, on behalf of the commission, not necessarily having in mind this case, but other cases in which this sort of problem arises.

MORRIS L.J. I agree.

*Document admitted.*

Solicitors: *Murray, Napier & Co. for W. Francis Ryan, Cardiff; M. H. B. Gilmour.*

M. M. H.

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## EDMISTON v. BRITISH TRANSPORT COMMISSION.

C. A.
1955
*Nov.* 23.

Singleton and Jenkins L.JJ.

### PRACTICE NOTE.

*Practice—Discovery—Affidavit of documents conclusive—R.S.C., Ord.* 31, *r.* 12, *proviso.*

APPEAL from Devlin J.

The plaintiff, an employee of the British Transport Commission, suffered serious injury on November 7, 1951, when he fell from the top of the tank of a locomotive engine while engaged on certain maintenance work at the commission's motive power department at Hamilton West station, in the county of Lanark. He brought an action against the commission, alleging common law negligence. His legal advisers desired to obtain information as to any similar accidents which had occurred to other employees of the commission, and of the Railway Executive; and on September 29, 1955, by summons before Master Baker, applied for an order to the commission to disclose "all documents relating "to accidents in which persons employed by the defendants or "by the Railway Executive have, since January 1, 1947, fallen "from, on or about the tops of locomotives, including accident "reports, accident books or records, copies or originals of "statutory returns or analyses or compilations containing records "of such accidents whether kept or made locally or in regions "or centrally."

There was already on the file an affidavit, sworn by the motive power superintendent of the commission's Scottish region, setting out certain documents and deposing to the fact that there were no other relevant documents. In reply the plaintiff's solicitor had sworn an affidavit expressing his belief that the defendant commission and the Railway Executive had in their possession further relevant documents.

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EDMISTON v. BRITISH TRANSPORT COMMISSION. (PRACTICE NOTE.)

The master and, on appeal, Devlin J. refused the application, and the plaintiff appealed.

*Miss Rose Heilbron Q.C.* and *J. F. Platts-Mills* for the plaintiff.

*N. R. Fox-Andrews Q.C.* and *Stephen Chapman Q.C.* for the defendants.

SINGLETON L.J. said that there was already on the file when this application for an order was made an affidavit by the representative of the defendants, and that affidavit, upon the practice followed in regard to discovery, was conclusive except in certain circumstances. The note in the Annual Practice "Upon application for further affidavit," following Ord. 31, r. 12, read: "Unless the affidavit is shown from these sources to be insufficient no further affidavit can be ordered; the opponent cannot (except under rule 19A) show by a contentious affidavit that it is insufficient." There was nothing in the plaintiff's solicitor's affidavit which enabled the court to go behind that of the defendants' representative; it referred to documents in general and did not specify any relevant document which was shown to be in the possession of the defendants. Furthermore, by the proviso to Ord. 31, r. 12, "discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs." He did not think that an order in the wide terms sought was necessary for disposing fairly of the cause or matter, and certainly it would not save costs. The appeal must fail.

Solicitors: *W. H. Thompson; M. H. B. Gilmour.*

A. W. G.

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1955
*Nov.* 23.

Denning, Hodson and Morris L.JJ.

## LEE *v.* SHEARD.

[1952 L. 1409.]

*Damages—Remoteness of damage—Company—Plaintiff injured owing to negligence—Plaintiff active director of private company—Loss of profits by company due to plaintiff's absence through injury—Plaintiff's receipts from company diminished accordingly—Claim for damages in respect of such loss.*

*Master and Servant—Per quod servitium amisit, action—Company—Loss of services of director. Company—Director.*

The plaintiff, while driving his car, received injuries in a collision with another car of which the driver was killed. The plaintiff was one of the two directors of a private company, and held nearly half the share capital. The company carried on the business of textile merchants, and the plaintiff acted as buyer and seller. Owing to the plaintiff's absence on account of his injuries there was a substantial diminution of the turnover and profits of the company, so that there was a heavy reduction of the proceeds of the business available for the plaintiff and his co-director.

In an action for negligence against the personal representative of the deceased driver, the plaintiff claimed, as one of the heads of damage, damages in respect of the diminution of the distributions received by him from the company. Hilbery J. found that the deceased had been wholly to blame, and awarded the plaintiff £1,500 in respect of this particular claim. On an appeal by the defendant:—

*Held*, that the plaintiff had suffered a real loss flowing from a tortious act, and that the damages were not too remote.

*Attorney-General for New South Wales* v. *Perpetual Trustee Co.* (*Ltd.*) [1955] A.C. 457; [1955] 1 All E.R. 846 applied.

Decision of Hilbery J. affirmed.

APPEAL from Hilbery J.

The plaintiff and one Ableman were the sole directors and shareholders in Ableman, Lee & Co. Ltd., a private company trading as textile merchants. Of the paid-up capital Ableman held 510 shares and the plaintiff held 490 shares. The plaintiff acted as buyer and seller, while Ableman controlled the office and internal administration.

On August 15, 1951, the plaintiff while driving his car came into collision with a car driven by one Sheard, who was killed, while the plaintiff suffered serious injuries, as a result of which he was absent from the business of the company for a substantial period. As a result of the plaintiff's absence the turnover and profits of the company fell substantially, so that the profits available for distribution between Ableman and the plaintiff were heavily reduced.

In an action for negligence brought by the plaintiff against the personal representative of the deceased driver, he claimed, inter alia, damages in respect of the diminution of his drawings from the company. Hilbery J. held that the accident was caused wholly by the negligence of the deceased; he assessed the loss to the company by reason of the plaintiff's absence at £3,000, and awarded to the plaintiff £1,500 in respect of that particular head of damage. The defendant appealed.

*Patrick O'Connor* for the defendant. This head of damages is too remote. The direct loss flowing from the accident was sustained by the company, not by the plaintiff. As the plaintiff was a director of the company, he was not a servant, so that the company could not bring an action per quod servitium amisit.

If a person suffers loss owing to a tort, but has no cause of action, no one can claim through him. Here, the company has suffered a loss which it cannot recover at law; that being so, no one else can recover in respect of that loss. If the plaintiff had been a servant, he would have had no cause of action, while the company could have sued per quod servitium amisit. It would be illogical that the plaintiff should recover under this head of damage, while his associate Ableman, who has suffered equal damage, plainly cannot. The general principles are set out in Mayne on Damages, 11th ed., at p. 44. The loss here is the loss of the company, and it is part of that loss for which the plaintiff has been awarded damages; that is indirect and too remote.

If persons choose to incorporate their business under the Companies Acts, they cannot expect to avoid the legal consequences. If a plaintiff's damages in a case such as this are not held to be too remote, there will be great difficulty, when a company makes a loss, in assessing how much of that loss is the direct result of the defendant's tortious act. *Brennan* v. *Gale* [1] is not in point; that was a case under Lord Campbell's Act, where the question as to damages is quite different.

*Gerald Gardiner Q.C.* and *Douglas Lowe* for the plaintiff. It appears from *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.* [2] that the old action per quod servitium amisit is now regarded as an anachronism and should not be regarded as extending beyond the case of a domestic servant. The question of master and servant has no relevance in this case.

Here, the plaintiff used to work and obtain money; if he had gone on working, he would have continued to obtain money. He was rendered unfit for work and ceased to obtain money, the reason for that being the tortious act of the deceased. It matters not whether the plaintiff obtained his money by way of salary, or bonus, or dividend, or director's fees. When a tort is proved, a plaintiff is entitled in law to recover damages occasioned by it, unless there is some rule of law which prevents it.

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[1] [1949] N.Ir. 178.

[2] [1955] A.C. 457; [1955] 1 All E.R. 846.

*O'Connor* replied.

Denning L.J. Mr. Lee was injured in a motor-car accident, and he sues the personal representative of the driver of the other car for damages in respect of the accident. The only issue in the case is as to one item of damage. Mr. Lee was a shareholder and a director of a private limited company in which there was only one other director and shareholder, a Mr. Ableman. Mr. Ableman had 510 shares, and Mr. Lee 490 shares. Mr. Lee did the outside work of buying and selling linen goods, Mr. Ableman doing the inside work of administration. As a result of his injuries, Mr. Lee was unable for a time to do his work for the company. In consequence the profits of the company were much lower than they otherwise would have been, and consequently the distribution of the proceeds to the two persons interested was much less than it otherwise would have been. The judge was satisfied that, as a result of the injuries, Mr. Lee received £1,500 less from the company than he otherwise would have done.

The question for determination is whether the item of £1,500 is recoverable in point of law from the defendant. On the one hand, on behalf of Mr. Lee, it is said that this is damage which flows directly from the tortious act of the deceased. On the other hand, Mr. O'Connor has argued that that item is too remote in law to be recovered. He says that the party who suffered the loss was the company, and that Mr. Lee is really seeking to recover part of the company's loss. He says that if a man chooses to turn himself into a limited company for the sake of limiting his liabilities, then he has to put up with the consequences, one of which is that he cannot recover for the company's loss.

On considering these two arguments I am of opinion that Mr. Lee succeeds. The loss which he suffered is a real loss of £1,500. He is entitled to recover that sum from the wrongdoer unless it is too remote, or there is some other good reason why he should not get it. In some circumstances a company itself can recover for damage suffered by the company as a result of the loss of services of its servant. If Mr. Lee had been a servant of the company, the company might have recovered damages in an action per quod servitium amisit, and then, of course, Mr. Lee could not also recover. But that is a cause of action which is

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now in disfavour and must be limited to cases of master and servant, and not extended to any new cases. That was so held by the Privy Council in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[1] In cases of that kind the company would be the party to recover such damages as are here in question, and not the servant. But Mr. Lee was not a servant, and the company are not entitled to recover their loss. In these circumstances I think that Mr. Lee is entitled to recover his real loss. So, too, a partner in a partnership would be entitled to recover his own real loss and no more.

I find no flaw in the reasoning of the judge in this case, and I think that the appeal should be dismissed.

HODSON L.J. I agree.

MORRIS L.J. I also agree.

*Appeal dismissed.*
*Leave to appeal refused.*

Solicitors: *White & Co.; Lees, Smith & Crabb.*

F. R. D.

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[1] [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846.

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C. A.

1955
*Oct.* 26, 27.

**Denning, Hodson and Morris L.JJ.**

## PAYNE *v.* WELDLESS STEEL TUBE CO. LTD.

[Plaint No. L. 695.]

*Factory—Floor—Maintenance—Depression in floor filled by loose steel plate—Accident to workman—No breach of statutory duty unless floor unsafe—Safety a question of fact—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (1), 26 (1).
*Fact or law.*

The plaintiff was a worker in a machine shop in the defendants' factory. Across the shop was a partition standing in a groove about two inches wide. There was a gap in the partition to allow access from one part of the shop to another; in this gap the groove had become widened by wear into a shallow depression of irregular shape, into which a loose iron plate had been placed to facilitate the passing of trolleys.

The plaintiff, when passing through the gap, stepped on the plate, which tipped slightly; the plaintiff overbalanced and received injury. In an action for personal injuries the plaintiff alleged negligence and a breach of sections 25 (1) and 26 (1) of the Factories Act, 1937.[1] The county court judge dismissed the action, finding that there had been no negligence, and holding that the floor was not unsafe and that there had therefore been no breach of statutory duty. On appeal:—

*Held*, dismissing the appeal, that the purpose of the sections in question was to ensure the safety of the workers; that the statutory requirements were that the floors, steps and means of access must be maintained in good repair so as to be safe for persons using them; and that the question of safety was one of degree for the judge to determine.

*Galashiels Gas Co. Ltd.* v. *O'Donnell* [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319 distinguished.

*Per* Hodson L.J. "Properly maintained" means properly maintained in relation to safety; "efficient" means efficient in achieving the safe result which is intended, and the words "in good "repair" also connote safety.

APPEAL from Judge Norris, sitting at Wolverhampton County Court.

The plaintiff worked at a roll-turning milling machine in a shop in the defendants' factory. The shop was divided by a partition sunk into a groove in the floor about two inches wide. A gap was left in the partition to permit access from one part of the shop to the other, and in this gap the groove had, owing to the passing of trolleys, become worn down so that there was a depression about nine inches wide and from 1½ to ¾ inches in depth. To enable trolleys to be pushed across this depression a steel plate had been placed in it which was loose and not shaped to fit the depression. The plaintiff, who had frequently walked through the gap, on a day in May, 1953, stepped on the steel plate, which moved slightly; the plaintiff lost his balance and stumbled against a pile of rolls which were awaiting machining; the pile rolled down and injured his foot.

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[1] Factories Act, 1937, s. 25 (1): "All floors, steps, stairs, passages "and gangways shall be of sound "construction and properly main-"tained."

S. 26 (1): "There shall, so far "as is reasonably practicable, be pro-"vided and maintained safe means "of access to every place at which "any person has at any time to "work."

S. 152: "'Maintained' means "maintained in an efficient state, in "efficient working order, and in good "repair."

In the county court he claimed damages for negligence and for a breach of the statutory duty laid down by sections 25 (1) and 26 (1) of the Factories Act, 1937. The county court judge dismissed the action. The plaintiff appealed on the issues of statutory duty.

*F. W. Beney Q.C.* and *Montague Waters* for the plaintiff. Under section 25 (1) there is an objective test: was the floor properly maintained? The judge below considered the questions of foreseeability and of safety, but such questions do not arise under this subsection. Parliament has laid down that the occupiers of factories must keep their floors in an efficient state and in good repair; if that is done, there is no breach; if not, there is a breach. It cannot be said that, when there is a depression in the floor in which there is a metal plate which is liable to move, the floor has been maintained in proper repair. The question of safety does not arise. [*Latimer* v. *A.E.C. Ltd.*[2] was referred to.]

Section 22, which deals with hoists and lifts, is similar in requiring an objective test: see *Galashiels Gas Co. Ltd.* v. *O'Donnell*[3]; in that case there could be no question of negligence, but there was an absolute and continuing obligation to maintain the lift in good repair which was not fulfilled if anything went wrong, even though the nature of the failure could not be explained.

Under section 26 (1) a substantial degree of safety is required, higher than that imposed at common law: see *McCarthy* v. *Coldair Ltd.*[4] The judge below failed to appreciate this distinction. There was no evidence that it was in any way impracticable to maintain the floor in a safe condition.

*Waters* following. When a groove is deliberately cut in a floor, and left unfilled, the question arises under section 25 (1) whether that floor is any longer "of sound construction." When the groove is allowed to wear into an irregular depression and causes an accident, then that accident arises because the floor is not of sound construction or properly maintained. The conception of something which is "sound" does not necessarily introduce considerations of safety; it is a more comprehensive word than "safe."

As regards section 26 (1), in *Mitchell* v. *North British Rubber Co. Ltd.*[5] the sheriff at first instance took into consideration the same matters as were relied on by the judge below, and was reversed on appeal.

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[2] [1953] A.C. 643; [1953] 2 All E.R. 449.

[3] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

[4] [1951] W.N. 590; [1951] 2 T.L.R. 1226.

[5] 1945 S.C.(J.) 69.

*John Thompson Q.C.* and *E. G. H. Beresford* for the defendants. The judge below decided that section 25 (1) was concerned with safety, and that the floor was safe; that is a question of fact and degree, with which the court will not interfere unless the judge was plainly wrong.

[DENNING L.J. We need not trouble you except on the construction of section 25 (1).]

That section, like section 26, is in Part II; all the sections in that Part are, and are described as being, concerned with safety, and it is unreal to argue that they are not so concerned. The question whether a floor is or is not out of repair is one of degree and therefore of fact. In *Latimer* v. *A.E.C. Ltd.*[6] the floor in itself was perfectly sound, and the accident arose from a temporary slippery condition; Mr. Beney, who appeared for the plaintiff workman, there argued [7] that the test of efficiency was whether the floor was safe or not. It is now sought for the plaintiff to exclude the notion of safety, because that introduces a question of foreseeability and matters of fact and degree: see *per* Lord Oaksey.[8]

"Maintained" is defined in section 152 as being kept "efficient"; once a standard is qualified by such an adjective, the question becomes one of degree and is therefore for the judge. His decision cannot be upset unless he plainly misdirected himself, or unless as a matter of law there was nothing on which his finding could be based. His decision is attacked on the ground that questions of safety and foreseeability do not come within the purview of section 25 (1); but that view is contrary to the decision in *Latimer's* case.[9] [*John Summers & Sons Ltd.* v. *Frost* [10] was also referred to.]

*Waters* replied.

DENNING L.J. This is a case of an accident in a factory which occurred in May, 1953. There was a concrete floor in the factory and in it there was a groove. This groove was crossed by trolleys; so much so that some of it had become worn so that it was about nine inches in width and about 1½ to ¾ inches in depth. In order to remedy the position so that the trolleys should not bump on it too much someone had put a steel plate in this groove, and from that time onwards the factory was used with trolleys crossing the groove in that way. Many people used it with no accident and no trouble until one particular day when Payne happened to be walking across. The iron plate tipped a little bit and he overbalanced towards some rolls and one of them came on to his foot and he was injured. He now brings an action against his employers alleging that they were guilty of negligence at common law, or, alternatively, that they were guilty of breaches of the Factories Act.

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[6] [1953] A.C. 643.

[7] Ibid. 646, 651.

[8] Ibid. 656.

[9] [1953] A.C. 643.

[10] [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

The judge has held that they were not guilty of any negligence at common law, and that is a finding which we cannot disturb. The argument before us has turned mainly on section 25 (1) of the Factories Act, which says that "All floors, steps, stairs, "passages and gangways shall be of sound construction and "properly maintained." "Maintained" is defined in section 152 as meaning "maintained in an efficient state, in efficient working "order, and in good repair."

The meaning of that section is this: the floors, steps and stairs must be maintained in good repair so as to be safe for persons using them. In the course of the argument I took the instance of stone steps which, in the course of years get worn away. When they are worn to a depth of one-eighth of an inch they are still in good repair, but when they are worn away, say, to a depth of four inches, they are not in good repair. It is a question of degree depending on whether they are safe or not.

Mr. Beney drew our attention to *Galashiels Gas Co. Ltd.* v. *O'Donnell*,[1] where there was a defect in a lift which could not have been discovered by using reasonable care. Yet the employers were held liable. The reason was because the lift was unsafe. There was therefore a breach of duty. Once there is a breach of duty, the liability of the occupier is an absolute liability. The question in this case, however, is whether there was a breach of duty at all. That depends on whether the floor was in good repair so as to be safe for persons using it.

It seems to me that the judge here found that this floor was safe despite the groove. He said: "I am not one who believes "that the floor of a factory is unsafe merely because it is "slightly uneven." It would be going much too far to hold that an occupier of a factory was guilty of a breach of duty because the floor happened to be a little worn and uneven.

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[1] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

The judge went on to give reasons why he thought that the groove was not dangerous. He pointed out: "The plaintiff knew "of its existence. He had been through the gap in the fence scores "of times. It had never occurred to him that it was dangerous. "This is a modern factory and well lighted. I should not, if I "were a factory inspector, have considered it a source of danger "to those passing through the gap. Mr. Williams, who is a shop "convenor, knew of it. I am satisfied that it had never occurred "to him that it was dangerous or that it could cause an accident." Those passages show that in the opinion of the judge this floor was in good repair so as to be safe for persons using it.

Then there is section 26 (1), which says: "There shall, so far "as is reasonably practicable, be provided and maintained safe "means of access to every place at which any person has at any "time to work." The judge's finding on safety means that that section also was not broken.

I do not say what conclusion I myself might have reached on this question of degree in this particular case. It seems to me that is essentially a matter for the county court judge, with which this court cannot interfere, and I would dismiss the appeal.

HODSON L.J. I agree. I only add a few words on the subject of section 25, because if there was no misdirection with regard to section 25 of the Factories Act, 1937, there can be no question but that the matter before the county court judge was a matter of degree and for him to decide.

He heard evidence as to the condition of the floor of the factory where the plaintiff sustained his accident, and he came to a conclusion of fact which cannot be disturbed; but the main burden of the attack upon his judgment is that he misdirected himself in dealing with section 25, which reads as follows: "Construction and maintenance of floors, passages and stairs. "All floors, steps, stairs, passages and gangways shall be of "sound construction and properly maintained." It was pointed out that in his judgment the judge had referred to the groove in the floor which was the cause of the plaintiff's fall and asked himself the question whether the existence of this groove constituted a breach either of section 25 or section 26 (1), or, alternatively, whether the defendants were negligent at common law in having the groove, so that he did not direct himself separately as to section 25 as opposed to section 26.

Section 26 has to do with safe means of access and the word "safety" appears in the section, whereas in section 25 there is no mention of the word "safety," and the judge, in dealing with the matter, undoubtedly addressed himself to the element of safety; and in that Mr. Beney, in his main contention, said he was wrong because, he said, there is nothing about "safety" in section 25 (1): "All floors, steps, stairs, passages and gangways "shall be of sound construction and properly maintained." Those words imply an absolute obligation upon the factory owner, and then, when one looks at the definition section, one finds what "maintained" means, namely, "maintained in an efficient state, "in efficient working order, and in good repair," and it is said that the judge has omitted to direct himself specifically in accordance with the definition and that there ought to be a new trial.

In my judgment the judge, although in an extempore judgment he may have, in a sense, telescoped his observations on the three matters before him, did essentially look at the problem in the right way. I notice that in the final address by counsel for the plaintiff the main matters discussed were: Was there a groove? Secondly, was it safe? And thirdly, did it cause the accident? So that one sees the way in which, after considering whether or not the accident happened in the way in which the plaintiff said it did happen, the matter was discussed. I think that, while the question must be approached in the light of the definition of the word "maintained," this definition must involve a consideration of safety. "Properly maintained," to my mind, means properly in relation to safety; "efficient" means efficient in achieving the safe result which is intended, and the words "in "good repair" also, I think, connote safety. That construction is supported by the placing of this section in a group of sections in Part II of the Act which are headed: "Safety. (General "provisions)." They are provisions inserted in that Act for the safety of the workman, and one can only consider efficient maintenance and good repair against a background of safety.

It is true that the obligation is an absolute obligation, but the first thing to decide is whether the thing concerned is in an efficient state of repair and properly maintained from the safety point of view. Accordingly, no assistance at all is gained from the *Galashiels* case [2] which has been cited to us, because there the lift in question was admittedly unsafe. Everybody agreed that it was unsafe when it moved from one floor to another when it should not have moved. The only question under discussion

[2] [1949] A.C. 275.

was whether the employers could be absolved from liability because they had no reason to foresee that the lift was unsafe.

In this case the judge addressed himself to the question of safety and considered the admissible evidence on that topic. The fact that he admitted evidence from people who formed their own opinions as to the safety or lack of safety of the floor does not, to my mind, make it legitimate to say that he therefore applied the wrong test, namely, a subjective test of some kind rather than the correct test, an objective test.

I think, therefore, that this appeal fails and should be dismissed.

MORRIS L.J. I have found much more difficulty in regard to this case than I think has been found by my Lords.

The way in which I approach it is as follows: The obligation under section 25—for I propose to deal with the case only from the point of view of section 25—is that "all floors shall be of "sound construction and shall be properly maintained." Reading in the definition, that means that "all floors shall be of sound "construction and shall be properly maintained in an efficient "state, in efficient working order and in good repair." It seems to me that the county court judge had to address himself to a consideration of the matters denoted by those words.

It is, I think, emphasized by the speeches in the *Galashiels* case [3] that the obligation imposed by section 25 is an absolute obligation. In his speech Lord Morton of Henryton adopted what had been said by the Lord Ordinary [4]: "'In my opinion "'. . . there is imposed on the defenders an absolute and con- "'tinuing obligation binding upon them which is not discharged "'if at any time their lift mechanism, in this case the brake, "'is not maintained in an efficient state, in efficient working "'order, and in good repair'." Lord Morton continued: "The "words of the subsection are imperative 'shall be properly "'maintained' and I can find nothing in the context or in the "general intention of the Act, read as a whole, which should "lead your Lordships to infer any qualification upon that "absolute obligation. It is quite true that the subsection, so "read, imposes a heavy burden upon employers, but the object "of this group of sections is to protect the workman. I think "the subsection must have been so worded in order to relieve "the injured workman from the burden of proving that there

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[3] [1949] A.C. 275.

[4] Ibid. 282.

"was some particular step which the employers could have "taken and did not take. This would often be a difficult "matter. more especially if the cause of the failure of the "mechanism to operate could not be ascertained. The statute "renders the task of the injured workman easier by saying, "'You need only prove that the mechanism failed to work "'efficiently and that this failure caused the accident'."

I will refer to what Lord MacDermott said[5]: "But when "the terms of the definition are regarded the meaning for which "he has contended is, in my opinion, at once displaced. To "my mind they indicate conclusively that in section 22 (1) "'maintained' is employed to denote the *continuance* of a "state of working efficiency. In the ordinary use of language "one cannot be said to maintain a piece of machinery in "efficient working order over a given period if, on occasions "within that period, the machinery, whatever the reason, is "not in efficient working order. In short, the definition describes "a result to be achieved rather than the means of achieving it."

To those citations I will add a brief citation from the speech of Lord Oaksey in *Latimer* v. *A.E.C. Ltd.*,[6] when he said: "On "the question of the construction of section 25 (1) of the Factories Act, 1937, I am of opinion that by virtue of that section "and the interpretation section 152, the respondents were bound "to maintain the floors and passages in an efficient state, but "I do not consider that it was proved that they were not in an "efficient state. A floor does not, in my opinion, cease to be "in an efficient state because a piece of orange peel or a small "pool of some slippery material is on it. Whilst I do not "agree that the maintenance of the floors is confined to their "construction, I think the obligation to maintain them in an "efficient state introduces into what is an absolute duty a "question of degree as to what is efficient."

This section is, of course, found in the part of the Act dealing with safety, and safety is certainly the underlying conception. I agree with Mr. Thompson's submission that when you are considering a floor and its state and whether it is in good repair you do not consider it from, for example, an aesthetic point of view and certainly, as Lord Oaksey says, there is a question of degree introduced; but the doubt that I have had is whether the judge approached the matter in quite the right way, and whether he may not have misdirected himself in arriving at his conclusion. I have wondered whether it might have been necessary for the case to go back to get a further finding from the judge; and had that happened there would, possibly, have been the necessity for a finding on the question of contributory negligence. The judge was, I think, invited to deal with the matter in the way in which he did, and therefore should not be criticized by those in the case, but it would, I think, have been easier for us if the judge had directly applied himself to the actual words of the definition which apply to the section.

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[5] [1949] A.C. 275, 287.

[6] [1953] A.C. 643, 656; [1953] 2 All E.R. 449.

The judge, amongst other things, says this: "One must look "at the nature of the thing itself and the knowledge of the "person injured and at the surrounding circumstances." I agree that the knowledge of the person injured may be a part of the evidence to be considered, but I have had the sort of feeling, reading this part of the judgment, that the judge was thinking: "Well, as the plaintiff knew all about this, this floor "was not other than in good repair and in an efficient state." What the plaintiff knew about it is only partially of assistance in deciding the question of fact, which was: Was this floor in an efficient state and in good repair?—approaching the question with a recognition of the fact that this was a floor in this factory.

A little further on he said that it was an exaggeration "to "call this groove a trench. It is no more than a small channel. "The plaintiff knew of its existence. He had been through the "gap in the fence scores of times. It had never occurred to "him that it was dangerous." Again, it may be relevant evidence that the plaintiff had been through the gap scores of times, but the way in which it is dealt with in this passage leaves me in some doubt as to whether the judge was not approaching the matter, not by applying himself to the question, was this floor in an efficient state and was this floor in good repair, but rather to the question: Well, did not the plaintiff know all about it?

Further on he says: "I am satisfied that it had never "occurred to him that it was dangerous or that it could cause "an accident." But that is not conclusive. It might not have occurred to the plaintiff, but still the test was: Was it in an efficient state and in good repair?

Therefore, I did have some doubt as to exactly what the judge had found. He accepted the evidence of the plaintiff, and the evidence of the plaintiff was that while walking in an ordinary way across this floor—for I think the plate must be regarded as part of the floor; it was put there to be walked upon—he put his foot upon a part of the floor which so rocked as to cause him to overbalance. I wondered, therefore, whether the judge was really intending to find that this floor was in an efficient state and in good repair.

My doubts, therefore, have arisen, not in regard to the law on the matter, but in regard to the way in which the judge had dealt with it—which was very largely, I think, because of the way in which he was invited to deal with it. But, having indicated those doubts, I do not dissent from the conclusions expressed by my Lords.

*Appeal dismissed.*

Solicitors: *W. H. Thompson; E. P. Rugg & Co. for Buller, Jeffries & Kenshole, Birmingham.*

F. R. D.

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1955
*Oct.* 28.

Lord Goddard C.J., Ormerod and Barry JJ.

## POOLE CORPORATION *v.* BLAKE.

*Highway—Private Street works—Improvements by local authority—Surface water drainage system laid down in private street in* 1923—*System vested in local authority—Proposed enlargement of system—Apportionment of expense on frontagers—Local authority satisfied or deemed to be satisfied with existing system—Whether local authority empowered to require frontagers to contribute to expense—Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 9 (1).

In 1923, when roads and sewers on a building estate were laid out in accordance with proposals submitted by the developers to the local authority, the surface water drainage system of a certain street was constructed so as to consist of gullies set at intervals and connected by pipes to existing surface water sewers, the gullies and pipes being "sewers" within the meaning of the Public Health Act, 1875, and accordingly by section 13 of that Act vesting in the local authority who, by section 15, were bound to keep them in repair. The gullies and pipes constituted a system of surface water drainage which was adequate and satisfactory for the street as originally constructed and continued to be adequate, but the local authority performed no works of maintenance or repairs and the system fell into disrepair. In December, 1953, the local authority resolved to do private street works in the street pursuant to the Private Street Works Act, 1892, and the work to be done included the improvement and enlargement of the surface water drainage system. On objection by the frontagers the justices amended the local authority's provisional apportionment of the estimated expenses by excluding the cost of the work in respect of the surface water drainage system. The local authority, contending that section 9 (1) of the Private Street Works Act, 1892, expressly authorized them to carry out the work to the surface water drainage system at the frontagers' expense, appealed:—

*Held*, (1) that the local authority had no power under section 6 of the Private Street Works Act, 1892, to carry out works in respect of the surface water drainage system, for the system had become irrevocably vested in them and, since the liability had been vested in them since 1923 and they had stood by and done nothing, as under the Public Health Act, 1875, so under the Private Street Works Act, 1892, they could not now say that they were not satisfied with the system.

*Bonella* v. *Twickenham Local Board of Health* (1887) 20 Q.B.D. 63; 4 T.L.R. 51 applied.

(2) That section 9 (1) of the Private Street Works Act, 1892, on its true construction was complementary to section 6 and entitled an authority, when ordering work to be done under section 6, to bring a road up to the standard of roads in the district, but that they must first have power to order the work under section 6. The local authority, accordingly, could not require the frontagers to contribute to the cost of improving the surface water drainage system.

CASE STATED by the Recorder of Poole.

The following are among the facts admitted or found by the recorder. In 1923 Park Estates Ltd., who owned an extensive area of land in the neighbourhood of Poole Park, Poole, started to develop the area as a building estate. On June 20, 1923, the appellant corporation received from Park Estates Ltd. plans, sections and descriptions of work intended to be done by them which were submitted for the purpose of obtaining by-law approval; the documents submitted showed the proposed road layout and construction and the foul sewage system in detail, and referred to the proposed disposal of road surface water by means of gullies and pipes. Approval for by-law purposes was granted in respect of the road proposals only, as the by-laws then in force did not cover foul sewers or surface water drainage; and thereafter, in the years 1923–1924, Park Estates Ltd. proceeded to construct roads and sewers in accordance with the proposals submitted to the corporation, and in particular laid out Orchard Avenue, a road about 700 yards long with three right-angle turns. The roadway and footpath in Orchard Avenue were made of gravel with grass curbs, except at the corners, where concrete was used, and nine gullies were set at intervals to carry off surface water from the road. The gullies were connected by pipes to existing surface water sewers or otherwise provided with a suitable outfall and were properly constructed, and the gullies and pipes were "sewers" within the meaning of the Public Health Act, 1875; accordingly, by section 13 of that Act they vested in and came under the control of the corporation, and by section 15 the corporation were required to keep them in repair.

In 1931 the frontagers of Orchard Avenue, at their own expense, laid a light tar-macadam dressing over the carriage way; in 1932 Park Estates Ltd. deposited with the corporation plans, sections and descriptions of a short cul-de-sac intended to abut on Orchard Avenue, including proposals for the surface water drainage by gullies and pipes connected to the existing water surface drainage system in Orchard Avenue. By that time new by-laws were in force covering, inter alia, surface water drainage, and the corporation approved the proposals. The cul-de-sac was duly completed and formed part of Orchard Avenue, and the surface water drainage system was constructed to the approval of the corporation's engineer.

The gullies and pipes constituted a system of surface water drainage which was adequate and satisfactory for Orchard Avenue as originally constructed, and continued adequate and satisfactory after the laying of the tar-macadam dressing. The corporation, however, performed no works of maintenance or repair upon the gullies and pipes, and in the late 1930s several of the gullies became choked, and more recently the system of surface water drainage had fallen generally into disrepair in common with the road and footpath surfaces. The corporation were satisfied with the surface water drainage system of Orchard Avenue at the time when it was constructed in 1923–1924 and with the addition at the time when it was made in 1932, and they had a reasonable time after the construction in which to decide whether or not they were satisfied, and, if it had not been affirmatively found that they were satisfied, it would have been found that they were deemed to have been satisfied by reason of the fact that they had not expressed dissatisfaction nor taken any step to improve or alter the system during such reasonable time. They made no attempt to alter the system or improve it until December 1, 1953.

Between the years 1923 and 1953 substantially all the plots (totalling 85) in Orchard Avenue were sold off and built upon. Poole had always included a number of roads privately laid out and constructed and not made up to the satisfaction of the corporation. The work of making up and taking over such streets had been undertaken on a considerable scale, but owing to the number of private streets and economic difficulties of the war and post-war years the work had not kept pace with public demand. The practice of the corporation had been to defer action in any particular street until it had been nearly fully developed, and in recent years residents in Orchard Avenue had pressed them to take such action, making strong complaint about the condition of the road and footpath surfaces.

On December 1, 1953, the corporation passed a resolution resolving to do private street work in, inter alia, Orchard Avenue, pursuant to the Private Street Works Act, 1892,[1] and approving the requisite specification, plans, sections, estimate and provisional apportionment of the estimated expenses duly prepared by their engineer. The works comprised levelling, metalling, curbing and making good the street, providing proper means for lighting and providing surface water drainage. By way of surface water drainage the specification and plans provided for 44 gullies (including existing gullies) and the necessary additional piping to lead to existing sewers or other outfalls. The road was at all material times provided with a separate system of foul sewerage and the corporation did not include work relating thereto in the specifications and estimates.

In the opinion of the corporation's engineer, with which the recorder found no reason to disagree, the surface water arrangements detailed in the specification and plans were necessary to drain the road effectively after making up in accordance with modern standards, and he justified the standard of surface water drainage system by proving that the standard was similar to that in each of five streets in residential areas which had been made up since the war under the Act, and with the streets constructed or in course of construction since the war on seven council housing estates. None of those other streets were contiguous with or adjacent to Orchard Avenue, nor was the surface water drainage system of Orchard Avenue connected or to be connected with that of other streets.

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[1] Private Street Works Act, 1892, s. 6 (1): "Where any street . . . "is not sewered, levelled, paved, "metalled, flagged, channelled, made "good, and lighted to the satisfaction of the urban authority, the "urban authority may from time to "time resolve with respect to such "street . . . to do any one or more "of the following works (in this Act "called private street works); that is "to say, to sewer, level, pave, metal, "flag, channel, or make good, or to "provide proper means for lighting "such street . . . and the expenses "incurred by the urban authority in "executing private street works shall "be apportioned . . . on the premises "fronting, adjoining, or abutting on "such street . . ."

S. 9 (1): "The urban authority "may include in any works to be "done under this Act with respect "to any street . . . any works which "they think necessary for bringing "the street . . . as regards sewerage, "drainage, level, or other matters, "into conformity with any other "streets (whether repairable or not "by the inhabitants at large), "including the provision of separate "sewers for the reception of sewage "and of surface water respectively."

The respondents, 16 frontagers in Orchard Avenue, objected to the corporation's proposals, and the justices amended the corporation's provisional apportionment of the estimated expenses by, inter alia, excluding £4,116, the cost of the surface water drainage. The corporation appealed to quarter sessions.

It was contended on behalf of the corporation that the doctrine of *Bonella* v. *Twickenham Local Board of Health* [2] had no application to work undertaken under the Private Street Works Act, 1892, that their satisfaction or implied satisfaction with the surface water drainage arrangements in an unmade-up street did not preclude them from providing at the frontagers' expense surface water drainage of a character appropriate to a fully levelled, metalled, channelled, curbed and lit street, and that section 9 (1) of the Act was intended to confer express powers to that end.

It was contended on behalf of the frontagers (1) that by reason of section 6 of the Act no sewage or drainage works could be provided under the Act unless the street was not drained to the satisfaction of the corporation, and that upon its true construction section 9 (1) did not alter the position; (2) that once the corporation were satisfied or deemed to be satisfied with a surface water system vested in them they could not be heard to say that they were not so satisfied; (3) that having regard to the corporation's satisfaction with the system in question it was unreasonable to require it to be improved at the frontagers' expense.

The recorder was of the opinion that once the corporation were satisfied or (following the doctrine of *Bonella* v. *Twickenham Local Board of Health* [2]) ought to be taken to be satisfied with the existing surface water drainage they could not thereafter improve or enlarge it at the frontagers' expense, and that section 9 (1) of the Act did not permit the corporation to do additional work. He therefore dismissed the appeal.

The corporation appealed.

*J. T. Molony Q.C.* and *Robert Hughes* for the corporation. In *Bonella* v. *Twickenham Local Board of Health* [3] it was held that a local board which had acquired a sewer by operation of law and had not taken steps to compel the frontagers to make a new sewer within a reasonable time must be deemed to have approved the existing sewer and could not therefore, after such lapse of time, proceed against the frontagers. The Private Street Works Act, 1892, provided a completely new code of law to which the doctrine in *Bonella's* case [3] developed under the Public Health Act, 1875, and the old case law, has no application. The provisions of section 6 of the Private Street Works Act, 1892, are similar to those of section 150 of the Public Health Act, 1875, but the Act of 1875 contained no provisions comparable to the other provisions in respect of this matter in the Act of 1892; under the earlier Act there was no appeal to justices, no grounds of objection were listed, and there was no provision, like that of section 9, empowering a local authority to carry out additional works or enabling them when invoking their powers to apply a standard determined by reference to other streets. There is a distinction between the resolution expressing dissatisfaction and resolving to carry out the works, and that approving the specifications and apportionment of expenses; in *Sheffield Corporation* v. *Anderson* [4] it was held that it was only the latter resolution which could be attacked: see *Southgate Borough Council* v. *Park Estates (Southgate) Ltd.*,[5] in particular the remarks of Lord Goddard C.J.[6] It is only where a specific ground of objection is referable to one of the heads listed in section 7 that an objection can be made good; the grounds listed in section 7 do not include the doctrine of *Bonella's* case,[7] and such authority as there is points to the conclusion that under the Act of 1892 a resolution of dissatisfaction cannot be challenged. Tomlin J. in *Sunderland Corporation* v. *Priestman* [8] said that a local authority could not be prejudiced by anything left undone, and that no question of estoppel could arise.

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[2] (1887) 20 Q.B.D. 63; 4 T.L.R. 51.

[3] Ibid.

Even if the doctrine of *Bonella's* case [9] does apply to cases governed by the Private Street Works Act, 1892, section 9 in certain circumstances takes a case out of that line of authority. The purpose of the Act is to enable streets to be made up to a good modern standard, and section 9 (1) is a completely new provision enabling local authorities to include in their proposal work which at the time of the proposal is necessary to bring the street into conformity with existing streets in the district. Under the section it is open to a local authority to do the work in due time and as part of making up a street and they must look at the state of affairs as existing at the time of their resolution. The words "into conformity" in the subsection must relate to the time of the resolution, for the condition of the other streets might vary between the time of the vesting of the street in question and the time of the resolution; if *Bonella's* case [10] is to be applied it would be impossible to give effect to those words. [Reference was also made to *Simmonds Brothers Ltd.* v. *Fulham Vestry.*[11]] Reliance is also placed on the broad reference to sewerage in section 9 (1) and on the concluding words which give a local authority an express power to put in a new sewer; if the contentions of the frontagers in this case are correct that word "sewer" would be meaningless.

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[3] 20 Q.B.D. 63.

[4] (1894) 64 L.J.M.C. 44.

[5] [1953] 1 W.L.R. 1274; [1953] 2 All E.R. 1008; [1954] 1 Q.B. 359; [1954] 1 All E.R. 520.

[6] [1953] 1 W.L.R. 1274, 1277.

[7] 20 Q.B.D. 63.

[8] [1927] 2 Ch. 107, 116.

[9] 20 Q.B.D. 63.

The decision in *Rishton* v. *Haslingden Corporation* [12] turned on whether a street was a thoroughfare; the observations of Channell J. in reference to the doctrine of *Bonella's* case [13] are obiter, for that doctrine was not fully considered by the court and Channell J. said [14]: "We have not very fully considered it, and "base our judgment upon" another ground. [Reference was also made to *Caley* v. *Kingston-upon-Hull Local Board of Health.*[15]] In *East Barnet Urban District Council* v. *Stacey*,[16] where a distinction was drawn between paving and drainage powers, the wide application of section 9 was not appreciated; no argument based on section 9 was addressed to the court and there were no facts upon which such an argument could be based. A decision of a local authority to bring section 6 into play cannot be challenged, and in bringing that section into play the local authority can invoke the express powers contained in section 9 (1). If the doctrine of *Bonella's* case [17] does apply to works under the Act of 1892, it does not apply on the facts of this case.

*E. S. Fay* for the frontagers. The gist of the case for the frontagers is that the surface water drainage system and the foul water drainage system in Orchard Avenue are repairable by the inhabitants at large, and, therefore, the cost of carrying out work on those systems cannot be thrown on the frontagers. *In re*

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[10] 20 Q.B.D. 63.

[11] [1900] 2 Q.B. 188.

[12] [1898] 1 Q.B. 294; 14 T.L.R. 155.

[13] 20 Q.B.D. 63.

[14] [1898] 1 Q.B. 294, 303.

[15] (1864) 5 B. & S. 815; 34 L.J. M.C. 7 (sub nom. *Cary* v. *The Local Board of Health of Kingston-upon-Hull*).

[16] [1939] 2 K.B. 861.

[17] 20 Q.B.D. 63.

*Jesty's Avenue, Broadway, Weymouth,*[18] is clear authority that the doctrine of *Bonella* v. *Twickenham Local Board of Health*[19] applies under the Private Street Works Act, 1892, and *Bonella's* case[19] is relied upon.

[LORD GODDARD C.J. We should like to hear you on the construction of section 9.]

Section 9 (1) is ancillary to section 6; the power to carry out work is contained in section 6 and the ambit of that power is found in section 9 (1). "Conformity" in section 9 (1) does not mean similarity with any street in the district, but conformity with contiguous streets, or streets sufficiently close to influence the work. In *Caley* v. *Kingston-upon-Hull Local Board of Health*[20] it was held that section 69 of the Public Health Act, 1848, which is similar in terms to section 150 of the Public Health Act, 1875, gave a local authority no power to bring a street into conformity with other streets, but that the street must be considered as a whole; that case is an example of the mischief that section 9 (1) was aimed at, and *Robertson* v. *Bristol Corporation*[21] is another illustration of the defects which it was intended to remedy. [Reference was also made to *Acton Urban District Council* v. *Watts.*[22]] If a local authority pass a resolution under section 6 to sewer only, they would not be able to invoke section 9 (1).

*J. T. Molony Q.C.* in reply. *In re Jesty's Avenue, Broadway, Weymouth,*[23] followed *East Barnet Urban District Council* v. *Stacey*[24]; in the case of *Jesty's Avenue*[25] it was not argued that *Bonella's* case[26] did not apply, and there was not, nor on the facts could there have been, any argument based on section 9 (1). If *Bonella's* case[26] does apply in this case it means that objection can be taken to the first resolution of the local authority, which is not in accordance with the authorities.

LORD GODDARD C.J. This is a case stated by the recorder of Poole, who dismissed an appeal from the borough justices upholding objections by certain frontagers to apportionments made on them by the corporation in respect of works carried out in Orchard Avenue, under the Private Street Works Act, 1892. The justices amended the apportionments by making certain reductions; they did not quash the whole of the apportionments because the objection taken by the frontagers was that they were called upon to pay for work part of which consisted of a reconstruction of the surface water drainage in the road in question [Orchard Avenue], which was an old system of drainage which had been there and was vested in the corporation, and was not a charge which fell on them under the Private Street Works Act, 1892. Both the justices and the recorder upheld the contention.

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[18] [1940] 2 K.B. 65; 56 T.L.R. 660; [1940] 2 All E.R. 632.

[19] 20 Q.B.D. 63.

[20] 5 B. & S. 815.

[21] [1900] 2 Q.B. 198; 16 T.L.R. 359.

[22] (1903) 67 J.P. 400.

[23] [1940] 2 K.B. 65.

[24] [1939] 2 K.B. 861.

[25] [1940] 2 K.B. 65.

[26] 20 Q.B.D. 63.

The facts which it is necessary to state can be put quite shortly: I think that most people know that Poole is one of those places which has increased enormously in size both in area and in population, and is today a far bigger place than it was in 1923. In that year a building estate, which includes the street in question, was first planned and laid out, and a company, Park Estates Ltd., who were developing the land, deposited with the corporation plans, sections and descriptions of work to be done by them. In 1924 Park Estates Ltd. proceeded to construct roads and sewers in accordance with the proposals contained in the documents submitted to the corporation, although at that time planning permission for sewers did not actually have to be given; and, among other things, a sewage system was laid down in the estate. A little later a short cul-de-sac, which it was intended should abut on Orchard Avenue, was laid out and the surface water drainage system for that portion was constructed to the satisfaction of the corporation's engineer. From the time of its construction the surface water drainage system in question has remained as it was laid down until notices were served under the Private Street Works Act, 1892, which, in effect, required the frontagers to contribute to the cost of laying a great many new gullies which connected with the sewer—in fact, to the cost of very largely increasing the sewage system which was already in existence for the purpose of taking off surface water.

At the time when the sewers were laid down in 1923 and 1924 they vested in the local authority under the Public Health Act, 1875. There has been a change in the law since then, and sewers which are now laid down by building contractors or estate developers will not automatically vest in the local authority unless and until the local authority take them over, in much the same way as roads, which, although they may be dedicated by the owner of the soil to the public, do not vest in the local authority and become repairable by them as representing the inhabitants at large unless certain proceedings are taken and dedication is accepted. What nearly always happens in these cases in urban districts is that notices are given under the Private Street Works Act, 1892, to make up the roads, and as soon as they are made up the local authority take them over and maintain them. Notices were given in this case, and the whole question is whether, there being in this road a system of drainage which was vested in, and was the property of, the local authority, the local authority can call upon the frontagers to improve or enlarge that system. The recorder has decided that they cannot, and he put his judgment in this way: "I was of the "opinion that once the corporation were satisfied or (following the "doctrine of *Bonella's* case [1]) ought to be taken to be satisfied "with the existing surface water drainage they could not thereafter improve or enlarge it at the frontagers' expense and that "section 9 (1) of the Act did not permit the corporation to do "additional work and I therefore dismissed the appeal."

When *Bonella* v. *Twickenham Local Board of Health* [2] was decided, the law governing this matter was entirely contained in section 150 of the Public Health Act, 1875, which was in very similar terms to section 6 of the Private Street Works Act, 1892, the section which now governs what a local authority are entitled to do. The Private Street Works Act, 1892, provides considerably more machinery than the Public Health Act, 1875, did, but except for section 9, to which I shall refer, I do not think that the other provisions of the Act are in any way material for the purposes of this case.

In *Bonella's* case,[2] which is binding on this court, there was an old system of drainage in a street and, exactly as here, requirements were made by the local authority to do work upon the street; the Court of Appeal held that that did not come within the work which, under section 150 of the Public Health Act, the local authority could require the frontagers to do. In that case it was to make a new sewer, and nowadays perhaps they could require it, but the reasoning of the case was, as Lord Esher M.R. pointed out, that the existing sewer was vested in the local authority, and [3]: "The moment it so vested it was, "as it appears to me, their duty to see whether that sewer was "sufficient for the drainage of the street for the purposes of "which it was then used. If they were not satisfied with it, "they would, I think, at that time have had power to deal with "it under the provisions of the Public Health Act, 1848, now

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[1] (1887) 20 Q.B.D. 63.

[2] Ibid.

[3] Ibid. 66.

"re-enacted by section 150 of the Public Health Act, 1875. It "being their duty then to consider whether it was sufficient or "not, they would be entitled I think to a reasonable time within "which to make up their minds whether it was so, and whether "they should act under those provisions. But, if after the lapse "of a reasonable time they have done nothing and expressed no "view on the subject, I think that must be taken, for the "purpose of the application of these sections, to be conclusive "as a matter of fact that at that time they were satisfied with "the sewer for the purposes for which it was then used. When "once they are so satisfied, I think they can no longer bring "into play the provisions of section 150. In my opinion the "provisions of the section with regard to the sewerage of the "street by the frontagers can only be brought into play within "the reasonable time during which the board are entitled to "say that they are dissatisfied with the existing sewer. If they "were no longer able to have recourse to the provisions of that "section, what would be their duty with regard to the sewer? "The sewer being vested in them, they would be bound to keep "it in repair under section 15 of the Public Health Act, 1875, "for the purposes for which it existed, and, if at any time they "came to the conclusion that it was not sufficient, they would "be entitled under section 18 to enlarge it, or alter the course "of it, or close it."

It is true that there is there a reference to the Public Health Act, 1848, but I think that the Master of the Rolls meant that as soon as the local authority found that the works were done they could, if they were not satisfied with them, have used their powers under section 150 and demanded a sewer which would be sufficient; but that after some years, far more than a reasonable time in which to make up their minds, and after they had stood by and done nothing until the sewer had become irrevocably vested in them, they could not then require work to be done, because they must have been satisfied with the sewer during that time. Once the corporation were satisfied, and the sewer was vested in them, then, in the opinion of the court, from that time onwards the sewer was the corporation's affair and so remained until the law was altered with regard to sewers by the Public Health Act, 1936 (which does not affect this case). Thus we have here, it seems to me, exactly the same situation as that which existed in *Bonella's* case,[4] save for one thing. Section 9 (1) of the Private Street Works Act, 1892, which

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[4] 20 Q.B.D. 63.

Mr. Molony has argued alters the whole position, is in these terms: "The urban authority may include in any works to be "done under this Act with respect to any street or part of a "street any works which they think necessary for bringing the "street or part of a street, as regards sewerage, drainage, level, "or other matters, into conformity with any other streets "(whether repairable or not by the inhabitants at large), including the provision of separate sewers for the reception of sewage "and of surface water respectively." The marginal note is "Incidental works," and I may say that although marginal notes are no part of the statute, it is quite clear that it is what is called an ancillary section.

Mr. Molony has submitted to us in the course of a careful argument that that section was intended to overrule *Bonella's* case.[4] With all respect, I do not think that it was; I think that it was intended to overrule another class of case, of which perhaps the best example is *Caley* v. *Kingston-upon-Hull Local Board of Health.*[5] That case showed that under the law as it then existed, which, for this purpose, was not changed by the Act of 1875, the local authority were only entitled to do works which were necessary to the road in question. They could not decide to make up the road and alter its level because the road running in the next street was at a different level, nor could they, if there was no sewer in the road, order a sewer to be put down, even though all the other roads in the neighbourhood had sewers. They had simply to consider the condition of the particular road; and section 9 (1) of the Act of 1892 was, in my opinion, meant to govern that state of affairs. I think that on a careful reading one finds that section 9 (1) is merely supplementary to section 6, which sets out what may be done. [His Lordship read section 6 (1) and continued:] Under section 9 (1) the urban authority "may include in any works to be done "under this Act with respect to any street or part of a street "any works which they think necessary for bringing the street "or part of a street, as regards sewerage, drainage, level, or "other matters, into conformity with any other streets (whether "repairable or not by the inhabitants at large), including the "provision of separate sewers for the reception of sewage and "of surface water respectively." If there had been no surface water system in this road at all, I think it would be quite clear

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[4] 20 Q.B.D. 63.

[5] (1864) 5 B. & S. 815; 34 L.J. M.C. 7 (sub nom. *Cary* v. *Local Board of Health of Kingston-upon-Hull*).

—so far I agree with Mr. Molony's argument—that the local authority could have ordered one; but that is not what they have ordered. The work they ordered in this case was work upon the existing sewer—no doubt because they were advised that the existing sewer was capable of dealing with the surface water and all that was needed was more gullies or tracks leading to gratings and into the sewer.

I think that section 9 (1) is merely complementary to section 6 and provides that an authority may, when ordering work to be done under section 6, take into account not merely the requirements of the road itself but also work to bring it up to the standard of the roads in the district; but that before it can do that it must see that the work which it is ordering under section 6 is justified. The ratio decidendi of *Bonella's* case[6] seems to show that the local authority cannot in these circumstances order this work to be done, because the old system is vested in them, and the Act does not enable a local authority to transfer a liability which has been vested in them since 1923 to the frontagers.

That is really enough to dispose of this case, but I ought to mention one or two of the other cases which have been cited. The first of the three cases to which I would particularly refer is *Rishton* v. *Haslingden Corporation.*[7] I only refer to that case because the leading judgment was delivered by Channell J., who was a great authority on these matters of local government, and I derive a great deal of assistance from referring to his judgments. I do not propose to state the facts in the *Rishton* case[7]—they are not identical—but Channell J. referred to *Bonella* v. *Twickenham Local Board of Health*[8] and the cases following that decision, and said[9]: "It appears to us that it is in "fact sewered, although very imperfectly and badly, and that, as "there has been no change whatever in the street for 70 years, "and the urban authority have been contented with it ever since "they became an authority, they cannot say that they are "dissatisfied with it." That case was decided on another ground and Channell J. said later[10]: "If this view" [expressed in *Bonella's* case[11] and other cases] "is correct the appeal should "be allowed on this ground also, but we have not very fully con-"sidered it, and base our judgment upon" another ground.

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[6] 20 Q.B.D. 63.

[7] [1898] 1 Q.B. 294; 14 T.L.R. 155.

[8] 20 Q.B.D. 63.

[9] [1898] 1 Q.B. 294, 302.

[10] [1898] 1 Q.B. 294, 303.

[11] 20 Q.B.D. 63.

Therefore, it is fair to say that the faintly expressed approval of *Bonella's* case [11] must be regarded as a dictum and not as a considered opinion of the court; but it is quite clear to me that the opinion of Channell J. was at that time, without giving it full consideration, that *Bonella's* case [11] was rightly decided.

The next two cases which have been brought to our attention are *East Barnet Urban District Council* v. *Stacey* [12] and *In re Jesty's Avenue, Broadway, Weymouth*,[13] both decisions of this court, and I do not think that we could allow this appeal without overruling those two cases. They are not, of course, exactly the same, but the position was in substance the same as it is in the present case.

Mr. Molony has sought to distinguish these cases from the present case by saying that section 9 of the Act of 1892 was never mentioned in them, but I think that it was never mentioned for a very good reason. If section 9 (1) bore the construction which Mr. Molony has sought to put upon it, I cannot believe that the counsel who argued those cases and who were very well versed in this particular branch of the law, and all the members of the court, would have ignored it. The fact is that section 9 (1) had and could have nothing to do with those cases any more than I think, with all respect to Mr. Molony's argument, that it has anything to do with the present case. Section 9 (1) on its true construction merely provides that if certain work is ordered under section 6 the additions the authority can make or the way it can direct the works to be done is in a manner ancillary to the main work, but if it cannot order the main work, then, of course, it cannot order ancillary work to be done. I think that is the very good reason for section 9 not being cited, and therefore no question of section 9, which was indeed the sheet anchor of Mr. Molony's argument, arises.

For these reasons I think that the justices and the recorder came to a correct decision in point of law and that this appeal fails and must be dismissed.

Ormerod J. I agree.

Barry J. I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co. for Wilson Kenyon, Poole; Church, Adams & Co. for Dickinson, Manser & Co., Poole.*

J. F. L.

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[11] 20 Q.B.D. 63.

[12] [1939] 2 K.B. 861; [1939] 2 All E.R. 621.

[13] [1940] 2 K.B. 65; 56 T.L.R. 660; [1940] 2 All E.R. 632.

C.-M. A. C.

[COURTS-MARTIAL APPEAL COURT.]

1955
*Nov.* 7.

## REGINA *v.* HARRIS-RIVETT.

Lord Goddard C.J., Pearce and Pearson JJ.

*Military Law—Court-martial—Jurisdiction—Investigation of charge—Request that charge be investigated by commanding officer at time of arrest—Charge investigated by commanding officer of regiment to which accused officer subsequently attached—"Commanding officer" not necessarily commanding officer at time of arrest—Army Act (as re-enacted and amended)* (44 *&* 45 *Vict. c.* 58), *ss.* 45 (1) (5), 46 (1).

*Military Law—Evidence—Confession—Judges' rules—Accused officer ordered to attend interview with military police—No caution administered—Evidence of answers to questions put by military police admissible if given voluntarily—Whether voluntary or not question of fact for court-martial—Judges' rules not applicable to charges against military personnel. Criminal Law—Evidence—Confession—Judges' rules.*

The appellant, a regular army officer, was stationed at the School of Infantry, Warminster, where, on January 28, 1955, he was charged with an offence under the Army Act alleged to have been committed in Berlin in December, 1954, and taken into military custody. On the same day he made a formal written request to the commandant of the School of Infantry requiring that the charge be investigated by him as commanding officer. The charge was not investigated by the commandant of the School of Infantry, but the appellant was taken to Berlin, where on January 30, 1955, he was attached to a regiment then in Berlin, and the commanding officer of that regiment investigated the charge and decided that it should be proceeded with, and the appellant was duly tried by a properly convened court-martial sitting in Berlin.

At the trial the evidence of an officer of the military police, relating to answers given by the appellant to questions put to him at an interview which the appellant had attended in obedience to an order given to him by a superior officer, was admitted, although no caution had been administered at the beginning of the interview. On appeal against conviction on the grounds (1) that under sections 45 (5) and 46 (1) the investigation of the charge should have been carried out by the commandant of the School of Infantry, and (2) that, since the judges' rules had not been complied with, the evidence of the officer of the military police was inadmissible:—

*Held*, (1) that the investigation contemplated by sections 45 (5) and 46 (1) of the Army Act need not necessarily be carried out by the commanding officer who was the commanding officer of the accused person at the time of arrest; and that, therefore, since a proper investigation of the charge had been carried out by the commanding officer of the regiment to which the appellant was attached, no question arose as to the jurisdiction of the court-martial.

*Quaere* whether, had no commanding officer investigated the charge, the proceedings of the court-martial would have been invalid.

(2) That, although in general the rules of evidence applicable to civil cases applied to courts-martial, in a civil case the judge had a discretion whether or not to admit evidence of a voluntary admission or statement if there had been a non-compliance with the judges' rules. The rule of law with regard to admissions or statements was that they were admissible if made voluntarily, and if a statement was voluntary it could be admitted before the court whether the judges' rules had been complied with or not. It was, therefore, for the court-martial to consider on the evidence whether or not a statement was voluntary, and, the court-martial having come to the conclusion on a proper direction that it was voluntary, the court could not interfere.

*Per curiam.* It is a matter for the Army Council to decide whether or not the judges' rules are to be applied as rules to courts-martial, because we do not think that they necessarily apply in the case of charges against serving officers and men. One difficulty is that military personnel are members of a disciplined force and at the time when an offence may be investigated are obliged to obey orders of superior officers, and we can quite see that there may well be occasions in which the judges' rules could not be applied without some qualification.

APPEAL against conviction.

In December, 1954, the appellant, a regular army officer and a lieutenant-colonel in the Bedfordshire and Hertfordshire Regiment, who was attached for duty to the School of Infantry, Warminster, was in Berlin. On December 23 he returned to Warminster, where, on January 28, 1955, he was taken into military custody by an officer of the military police of equal rank and charged with attempting to procure the commission of an act of gross indecency contrary to section 11 of the Criminal Law Amendment Act, 1885, at Berlin, on a date between December 14 and 17, 1954. On the same day the appellant made a formal written request to the commandant of the School of Infantry at Warminster requiring, in accordance with rule 8 of the Rules of Procedure, 1947, that the charge be investigated by him as his (the appellant's) commanding officer. The appellant was taken in military custody to Berlin, where, on January 30, 1955, he was attached to the first battalion of the Manchester Regiment, then in Berlin. The commanding officer of that regiment investigated the charge and, having taken a summary of evidence, decided that it should be proceeded with. The proper officer convened a general court-martial in Berlin before which the appellant was described as "attached to the "1st Battalion, Manchester Regiment." The appellant made a special plea to the general jurisdiction of the court under rule 34 of the Rules of Procedure, 1947, but that plea was overruled by the court.

On January 24, 1955, the appellant, in pursuance of an order given to him by the commandant of the School of Infantry, reported to the War Office, where he was ordered to go to a room with an officer of the military police and to answer questions. The appellant gave certain answers to the officer of the military police, but was not given a caution before he did so. At the court-martial evidence was given by that officer regarding his interview with the appellant, and an objection made on behalf of the appellant to the admissibility of the evidence was overruled.

The court-martial dismissed the charge under section 11 of the Criminal Law Amendment Act, 1885, but the appellant was found guilty on an alternative charge of disgraceful conduct of an indecent kind contrary to section 18 (5) of the Army Act, and he was sentenced to be cashiered. He appealed against conviction on the grounds, inter alia, that in view of the request which he had made for the matter to be investigated by his commanding officer, he had the right under sections 45 (5) and 46 (1) of the Army Act,[1] and rules 3, 4, 8 and 129 of the Rules of Procedure,

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[1] Army Act, s. 45: "The following regulations shall be enacted "with respect to persons subject to "military law when charged with "offences punishable under this "Act:—(1) Every person subject to "military law when so charged may "be taken into military custody . . . "(5) The charge made against every "person taken into military custody "shall without unnecessary delay be "investigated by the proper military "authority . . ."

S. 46 (1) "The commanding "officer shall, upon an investigation "being had of a charge made against "a person subject to military law "under his command of having com"mitted an offence under this Act, "dismiss the charge, if he in his dis"cretion thinks that it ought not to "be proceeded with, but where he "thinks the charge ought to be pro"ceeded with, he may take steps for "bringing the offender to court"martial. . . ."

Rules of Procedure, 1947 (S.R. & O., 1947, No. 2354), r. 4 (A): "The "commanding officer will dismiss a "charge brought before him if in his "opinion the evidence does not show "that some offence under the Army "Act has been committed, or if, in "his discretion, he thinks that the "charge ought not to be proceeded "with."

R. 8 (A): "Where an officer is "charged with an offence under the "Army Act the investigation shall, "if . . . the accused requires it, be "held, and the evidence taken in his "presence in writing, in the same "manner, as nearly as circumstances "admit, as is required by rules 3 "and 4 in the case of a soldier."

R. 129: "The expression 'com"'manding officer' as used in the "provisions of the Army Act relating "to 'courts-martial', and to the "'power of commanding officer', "and in the provisions consequential "thereon, and in these rules, means, "in relation to any person, the officer "whose duty it is . . . to deal with "a charge against that person of "having committed an offence, that "is, to dispose of it on his own "authority."

1947, to have the charge investigated by the commandant of the School of Infantry, who, he contended, was at all material times his commanding officer, and that the failure to comply with those provisions deprived the court-martial of jurisdiction to try him on the charge of which he was convicted; and that the evidence of the officer of the military police who had interviewed him in London was improperly admitted in evidence at the trial, because he was, at the time of the interview, under restraint and under a duty to answer the officer's questions and, in the circumstances, the failure to caution him at the beginning of the interview amounted to a failure to comply with the judges' rules.

*Brian Clapham* for the appellant. The court-martial had no jurisdiction to try the appellant. The liability of an officer or soldier to be tried by court-martial rests on the Army Act, and he is only liable to be tried if the provisions of the Act and of the Rules of Procedure, 1947, made thereunder have been complied with. Under sections 45 (5) and 46 (1) of the Army Act a person subject to military law who is taken into military custody has the right to have the charge investigated by his commanding officer. Rule 8 of the Rules of Procedure, 1947, provides that in the case of an officer, if the commanding officer orders or if the accused requests it, the investigation shall be held in the same manner as required by rules 3 and 4 in the case of a soldier. Under section 45 (5) the investigation must be held without delay, and rule 4 gives the officer carrying out the investigation a wide discretion to dismiss the charge. The right, therefore, is a valuable one, for the commanding officer, unlike justices, is under no obligation to commit for trial merely because there is a prima facie case, but in deciding whether or not the charge ought to be proceeded with can consider a number of matters, including, for example, the character of the accused (see the Manual of Military Law, note 4 (*a*) to Rule of Procedure 4), which only he might know. Rule 129 shows that the expression "commanding "officer" in this context means the person who has power to dispose of a charge on his own authority. [Reference was made to Queen's Regulations, reg. 685 (1955 revision).] Having regard to rules 3, 4, 5 and 8 of the Rules of Procedure, the "proper "military authority" to investigate the charge under section 45 (5) in this case could only be the commandant of the School of Infantry at Warminster, for he was the officer whose duty it was to deal with the charge.

[LORD GODDARD C.J. If that is right it would mean that if a soldier charged with an offence committed, say, in Singapore, were arrested in this country, a commanding officer here would have to investigate the charge and go into happenings in Singapore; how could he be in a position to do that? Why was the commanding officer of the Manchester Regiment in Berlin not the "proper military authority" to investigate the charge in this case? He was the only person who could do so without undue delay.]

The appellant was not attached to the Manchester Regiment until two days after he had requested that the charge be investigated by his commanding officer; at the time of the request the only person who answered that description was the commandant of the School of Infantry. The prosecution are not entitled to choose who shall carry out the investigation, and it is wrong to take a man away from his own unit after he has made such a request: compare the provisions with regard to soldiers who have committed offences whilst on leave. A soldier may only be attached to a regiment for the purposes of carrying out duties; an officer under arrest carries out no duties: see Queen's Regulations, reg. 699 (1955 revision). From the time of his arrest and request, therefore, the appellant could not lawfully be attached to another unit, and the commanding officer of the Manchester Regiment in Berlin was in the position of a governor of a military prison who is not the commanding officer of a soldier in the prison: see Queen's Regulations, reg. 685 (*d*) (1955 revision).

The charge to be investigated is not necessarily the final charge on which the accused is tried, but that on which he is taken into military custody. Had the commandant of the School of Infantry investigated the charge made against the appellant at the time of his arrest on January 28 it might have made a considerable difference to the appellant, for that was the charge on which he was acquitted, and the commandant might well have decided that it was doubtful whether the evidence would lead to a conviction (see Queen's Regulations, reg. 711), and under section 46 have dismissed the charge.

A failure to comply with the requirements of sections 45 (5) and 46 (1) deprives the accused person of a fundamental right to have the matter investigated by someone who knows him and knows his character, and strikes at the jurisdiction of the court-martial; any trial taking place after such a failure is a nullity. The defect in the present case cannot be cured by a purported summary of evidence or by a charge sheet signed by a person who was not the commanding officer at the material time. The fact that it might have been more convenient for the investigation to be carried out in Berlin is irrelevant; if the authorities desired the matter to be dealt with in Berlin, the appellant should have been attached to the Manchester Regiment first and then charged.

The questions put to the appellant at the interview with the officer of the military police were put without any caution having been administered, and amounted to cross-examination; that was a failure to comply with the judges' rules, for the appellant had been ordered to attend the interview and was under a duty to answer the questions. The evidence of that officer, therefore, should not have been admitted at the court-martial.

*E. Garth Moore* for the prosecution. The charge was investigated by the appellant's commanding officer, for at the time when he was sent for trial his commanding officer was the commanding officer of the Manchester Regiment in Berlin, and not the commandant of the School of Infantry at Warminster.

[Lord Goddard C.J. Had he not the right to have the charge investigated by the person who was his commanding officer at the time of his arrest?]

A person subject to military law is only entitled to have the charge investigated; he is not entitled to pick and choose the committing commanding officer. If he is properly attached to a new unit, the commanding officer of that unit becomes his commanding officer. In the exigencies of military life it would be quite impracticable if a charge had to be investigated by the commanding officer at the time of arrest; if a soldier in the front line was charged with an offence, his commanding officer might be killed before he could carry out the investigation. On this narrow issue only, the appeal should fail.

*Brian Clapham* replied.

Lord Goddard C.J., delivering the judgment of the court: The appellant was convicted before a general court-martial sitting in Berlin of an offence of an indecent character with a civilian in Berlin. He took objection before the court-martial by way of a plea to the jurisdiction on the ground that certain requirements of the Army Act and the Rules of Procedure made under that Act had not been complied with, which he said destroyed the jurisdiction of the court. The court overruled the objection and convicted him on one of the charges and sentenced him to be cashiered. This court is not concerned with the sentence.

The substantial ground of appeal put forward here is that a right under the Rules of Procedure and the Army Act of having the charge investigated by his commanding officer before he was brought to court-martial was not afforded to the appellant. In the opinion of the court, the appeal entirely fails, and this point, which under any circumstances and certainly in this case is highly technical, has no substance.

The facts were these. While the appellant was in Berlin an offence of an indecent character with a civilian was alleged to have taken place. He returned to England, and went back to Warminster, where he had been before he went to Berlin, and where he was attached to a School of Infantry. While he was there, owing to statements which we suppose had been made to the provost authorities in Berlin, he was arrested by an officer of equal rank, Lt.-Col. Elliott, on a charge of indecency. He demanded that the affair should be investigated by the commanding officer at Warminster, though, of course, it is perfectly obvious that it would be a most absurd thing if the commanding officer at Warminster was supposed to go through the serious matter of investigating an offence which was not only committed in Germany, but committed against a civilian in Germany. What sort of investigation could have taken place? It is clear that the sort of investigation that could have taken place in England under those circumstances would have been of a most jejune description. As I pointed out in the argument, if the appellant's contention were right, a soldier who was alleged to have committed an offence against a civilian in Hong Kong or Malaya or some other far-distant possession of the Queen, and had returned to England, could demand that the matter be investigated by his commanding officer in England, that is to say, by an officer who might never have seen him before or might have no opportunity of finding out anything that had happened in the foreign place where the offence had been committed, except possibly by keeping the soldier under arrest until statements could have been obtained from abroad; and it would be a very grave prejudice to any officer or soldier if this court had to give any colour or support to such a contention.

[His Lordship read sections 45 (1) (5) and 46 (1) of the Army Act, and continued:] Although it is not suggested that an offence of this description should be dealt with summarily, it must be investigated by the commanding officer; but the section does not specify which commanding officer, and an officer may be serving under a variety of commanding officers up to the time he leaves the service. In the present case the appellant was taken into military custody, and then taken by the officer in whose custody he properly was to Germany, having before he left demanded an investigation by his commanding officer. The commanding officer in England could not investigate the charge and did not do so, but the appellant was attached to a regiment, the first battalion of the Manchester Regiment, which was then in Germany. He was attached there so that the commanding officer of a regiment in Germany, where the court-martial would have to be held, could investigate the charge; and that commanding officer did investigate the charge, and decided that there was a case to be tried by court-martial. Thereupon, the major-general commanding that part of Germany, who was the proper person to act as convening officer, convened a court-martial, and the court-martial having been convened, found before them the charge sheet, which stated: "The accused, substantive major, temporary lieutenant-colonel, "Adrian Andrew Brodie Harris-Rivett, the Bedfordshire and "Hertfordshire Regiment, attached to the 1st Battalion Man-"chester Regiment, an officer of the Regular Forces, is charged "with the following offences"; and was signed by the lieutenant-colonel commanding the 1st battalion Manchester Regiment. Those charges were sent to the general, who ordered that he was to be tried by court-martial. If no commanding officer had investigated these charges, it might have been said, but we are not deciding one way or another, that that might have affected the jurisdiction of the court-martial, and in other cases where the facts are different this court might have to decide whether the failure of a commanding officer to investigate a charge invalidates the subsequent proceedings of a court-martial.

In this case, however, an investigation was held, and it was held by the taking of a summary of evidence. Then, having taken the summary of evidence, the investigating officer decided that there was a case to be tried by court-martial and, accordingly, to use a civilian expression, the appellant was committed for trial by court-martial. Section 46 of the Army Act provides: "The "commanding officer shall, upon an investigation being had of a "charge made against a person subject to military law under "his command . . . dismiss the charge" or ". . . he may take "steps for bringing the offender to court-martial." That must be the commanding officer who holds the investigation. It is quite clear that the commanding officer who may be the commanding officer at the moment of arrest may not be the commanding officer to carry out the investigation. The question here is: Who was the commanding officer who carried out the investigation?

The commanding officer was the commanding officer of the regiment to which this officer had been temporarily attached and, in the opinion of the court, no question arises here as to jurisdiction, and that ground of appeal fails.

One other point put forward by Mr. Clapham was that the judges' rules had not been complied with in this case in that certain questions were put to the appellant when he was in custody. The circumstances were that the appellant had been ordered to present himself at Lansdowne House, in London, there to be interviewed by an officer of the military police, Lt.-Col. Elliott. A charge had not then been made against him, so that he was not in custody in that sense, and he had not been taken into custody in the formal sense, although he was present at the interview in consequence of an order which, being an officer, he was bound to obey. Having been given that order, it seems to us that it is extremely likely that it would have been a breach of discipline if, when Lt.-Col. Elliott came in and began to ask questions, he had taken himself out of the room. He was there, perhaps not formally in custody, but in a way which the judge advocate described as militarily in custody; at any rate he was there in pursuance of an order. He was asked to answer certain questions, and it is said that they amounted to cross-examination. We do not think that they did, but it is not necessary for the court to give a considered decision on that point. We do, however, want to say that, although no doubt the rules of evidence that apply in civil cases apply generally speaking in courts-martial, the rule of law with regard to confessions or statements made by accused persons is that they are admissible if they are made voluntarily.

It is perfectly true that the judges did by resolution lay down for the guidance of police officers certain rules, which are now known as the judges' rules, with regard to giving cautions and the putting of questions to suspects or persons in custody, but it is a matter for the Army Council to decide whether those rules are to be applied as rules to courts-martial, because we do not think that the rules made by the judges to be observed in the case of civilian prisoners necessarily can apply to serving officers and men. No doubt courts-martial have to decide the question of law in the same way as it has to be decided in civil cases, that is to say, whether or not the statement is voluntary, but if it is a voluntary statement it can be admitted whether the judges' rules have been complied with or not. If, in a civil court, the judges' rules have not been complied with, the judge may in his discretion refuse to admit the evidence, notwithstanding the fact that it is a voluntary statement, so that if a man has made a statement after he has been in custody, even if the statement was made voluntarily and not in consequence of any threat or promise of reward or promise of benefit, nevertheless, if no caution was given, the court may refuse to admit the statement. It is a matter of discretion. One difficulty of applying those rules to military personnel is that they are under discipline, and at the time when an offence may be investigated they are still members of a disciplined force and are obliged to obey orders of superior officers. In this particular case, the question arises at once that the appellant had been ordered to attend the interview with Lt.-Col. Elliott. No such question as that arises in civilian life, and it may be, therefore, that at some time, by Queen's Regulations, the judges' rules may be applied as they stand, or with certain qualifications. We can quite see that there may well be occasions in which the judges' rules could not be applied without some qualification to charges which have been made against members of disciplined forces who are obliged to obey orders.

There is no ground for interfering with the result of the court-martial here, because we do not think that the evidence was wrongly admitted, and, in any case, the court-martial were properly directed by the judge advocate. They had to consider whether the statement was a voluntary statement, and they came to the conclusion, having heard the evidence, that it was. There is, therefore, no reason for this court to interfere, and on both grounds the appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Eland, Hore, Pattisson, Nettleship & Butt; Director, Army Legal Services.*

J. F. L.

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## REGINA *v.* PADDINGTON NORTH AND ST. MARYLEBONE RENT TRIBUNAL. *Ex parte* PERRY AND OTHERS.

1955
*Oct.* 18.

Lord Goddard C.J., Ormerod and Glyn-Jones JJ.

*Landlord and Tenant — Rent tribunal — Standard rent — Increase— "Services" — Meaning — Application by landlord for increase of rent—Rents increased by tribunal—Right of Divisional Court to*

[Reported by E. J. Barton, Esq., Barrister-at-Law.]

*interfere by certiorari—Costs—Housing Repairs and Rents Act*, 1954 (2 & 3 *Eliz.* 2, *c.* 53), *s.* 40.

The landlords of a block of flats applied to the rent tribunal under section 40 of the Housing Repairs and Rents Act, 1954, for an increase of rent for four flats in respect of services provided by them under the contract of tenancy and voluntarily. The tenancies were controlled at a standard rent fixed at the rent at which the flats were let on or before September 1, 1939. The tribunal, having heard evidence on behalf of the landlords and of the tenants, increased the rents of the flats. They listed the services which they had considered, in a schedule to their determination, to include: central heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases; porterage, cleaning common parts, removal of refuse, pest control, floor coverings to common parts. On an application by the tenants for an order of certiorari to quash the decision of the tribunal:—

*Held*, that the items in the schedule all appeared to be "services" within the meaning of section 40, and that accordingly there was no error on the face of the order; that the tribunal had jurisdiction in the circumstances; that, having got it, there need be no evidence for them to act—they had jurisdiction to make such inquiries as they thought fit, and act on their own views, knowledge and opinions, provided that they gave the parties an opportunity of being heard; and that, accordingly, certiorari would not lie.

*Rex* v. *Brighton and Area Rent Tribunal, Ex parte Marine Parade Estates (1936) Ltd.* [1950] 2 K.B. 410; 66 T.L.R. (Pt. 2) 9; [1950] 1 All E.R. 946 applied.

It was not necessary for both the rent tribunal and the landlords to be represented on the application, and there would therefore be only one set of costs.

Application for orders of certiorari.

In January, 1955, the respondent landlords, Old Gate Estates, acquired the ownership of a large block of flats known as Ivor Court, London, N.W.1, and in March, 1955, they made application to the rent tribunal under section 40 of the Housing Repairs and Rents Act, 1954,[1] for increases of rent on account of the increase of cost in the services which they provided to their tenants, both under the tenancy agreements and voluntarily. The applications were opposed by the tenants.

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[1] Housing Repairs and Rents Act, 1954, s. 40: "(1) The following provisions of this section shall have "effect where a dwelling-house is let "under a controlled tenancy or is "occupied by a statutory tenant, and "—(*a*) the standard rent of the dwelling-house is the rent at which it "was let on a letting beginning on "or before September 1, 1939, or an "amount ascertainable by apportionment of a rent at which a property "comprising the dwelling-house was "let on such a letting as aforesaid "(whether such an apportionment has "been made or not), and (*b*) services "for the tenant are under the terms "and conditions of the letting to be "provided, or are provided, by the "landlord. (2) If—(*a*) by an agreement in writing relating to the "services mentioned in paragraph (*b*) "of the last foregoing subsection and "made after the commencement of

From an affidavit in support of the application filed on behalf of the tenants it appeared that the hearing before the tribunal proceeded on the basis of a schedule provided by the landlords purporting to show the increases in costs between 1939 and 1954 of porterage, porter's flat, heating, hot water, lifts, cleaning, lighting, etc. It also appeared that the landlords failed to prove the bulk of the increases of the costs of services listed in their schedule, being almost totally unable to give the 1939 costs, and being at times grossly erroneous as to the 1954 costs. The tribunal nevertheless granted increases of approximately 83 per cent. of what the landlords claimed, listing the services they had considered in a schedule to their determination as follows:

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|---|---|
| 1. Services which are to be provided by the landlord under the terms and conditions of the letting. | Central heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases. |
| 2. Services which are provided by the landlord not under the terms and conditions of the letting. | Porterage, cleaning common parts, removal of refuse, pest control, floor coverings to common parts. |

The tenants, claiming that the determination was based on grounds with which they had had no opportunity of dealing, or

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"this Act between the landlord and the tenant or a former tenant of the dwelling-house it has been agreed that the landlord shall be entitled to an increase of rent, of an amount specified in the agreement, in respect of any rise, over the period beginning with September 3, 1939, and ending with the commencement of this Act, in the cost of the provision of the services, or (*b*) on an application by the landlord the tribunal constituted under the Act of 1946 for the district in which the dwelling-house is situated has at any time after the commencement of this Act determined as respects the said services that in all the circumstances it is just that the landlord should be entitled to an increase of rent, of an amount specified in the determination, in respect of any such rise as aforesaid, the landlord shall be entitled to recover the amount of the increase agreed or determined as aforesaid notwithstanding anything in the terms of the tenancy or statutory tenancy or any enactment, subject, however, to the provisions of the next following subsection. . . . (5) Before determining any application under paragraph (*b*) of subsection (2) of this section the tribunal shall make such inquiries (if any) as they think fit and shall give the landlord and the tenant an opportunity of being heard or, at the option of the party, of submitting representations in writing."

on the schedule which they considered had been proved false, or, further, on items which they alleged the tribunal could not in law properly take into account, moved for certiorari to quash the order of the tribunal.

*John Wilmers* for the tenants. Under section 40 of the Housing Repairs and Rents Act, 1954, the tribunal has prima facie to decide what is the amount of the increase of rent which it is just that the landlords shall recover in respect of the rise in costs since September 3, 1939, until the commencement of the Act, in providing the services. The amount of the rise in the cost of providing the services is a collateral matter which the tribunal must determine. Repairs to the central heating and hot water plant and to the lifts should be under a repairs increase, as these are repairs and not services. Parliament did not intend that the landlord should get an increase twice over, as there are two methods of obtaining an increase of rent—(1) the increase under section 40 of the Act of 1954 on account of the increased cost of providing services, and (2) a repairs increase under section 23 of the Act of 1954.

[LORD GODDARD C.J. I agree, but all the court can do is look at the order which has been made.]

In this case the tribunal have allowed for an increase because of the maintenance of lifts.

[LORD GODDARD C.J. The maintenance may be repairs; but what about electricity? How can this court go into figures?]

Electricity may be services, but in this case the tribunal has considered and taken into account items which are not services. Whether an item is a repair or a service is a question of law which the court must consider, and there is no need to rely upon any inaccuracy in the wording of the order.

[LORD GODDARD C.J. On the face of it, it is a perfectly good order, and we cannot go behind it.]

It is possible to go behind the order where the tribunal has considered matters which are clearly not services. The fact that the tribunal have called something a service does not make it a service.

[LORD GODDARD C.J. The tribunal may have gone wrong within their jurisdiction, but there is no appeal from their decision, and we cannot interfere on certiorari.]

As there is no definition of "services" in the Act of 1954 one must go for a definition to the definition section of the Furnished Houses (Rent Control) Act, 1946, which Act set up these tribunals.

[LORD GODDARD C.J. Is there a provision that these Acts should be read as one?]

No.

[LORD GODDARD C.J. The order on the face of it is good. The tribunal may have gone wrong, but that is a matter for appeal, not certiorari, and as there is no provision for appeal there is no remedy.]

One other matter which helps to show what services are under the Act of 1954 is that under the repairs increase of the Act of 1954 the landlord must satisfy section 23 (1) (*b*) in proving that the repairs have been carried out and serve the prescribed form of declaration under section 25 (1) (*b*). "Repair" is defined in section 49 as maintaining, "but does not include improvement or "structural alteration or the provision of additional or improved "fixtures and fittings." There is a clear distinction between maintaining and improving, which is reinforced by the wording of declarations, and if matters qualify for a repairs increase they cannot also qualify as a service increase.

*Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Zerek* [2] shows that in reaching their decision on collateral matters the tribunal must proceed on principles that a court would proceed upon, i.e., on such evidence as a court of equity would proceed upon on a suit for rectification; they have not done so in this case. They are wrong in law.

*Rodger Winn* for the tribunal. Section 40 of the Act of 1954 lays down the three conditions which must be satisfied before the tribunal can act. If these are fulfilled and the tribunal follows the procedure under subsection (5), then *Rex* v. *Brighton and Area Rent Tribunal, Ex parte Marine Parade Estates (1936) Ltd.*[3] shows that this court cannot interfere. If the tribunal award an increase in respect of something which is not a service, then admittedly certiorari would lie to quash that part of the order, but that is not the present case. Certiorari is not a mode of appeal. If the landlord says that he provides a service which he did not provide, then this court cannot interfere if some services are established.

*John Gower*, for the landlords, was not called upon.

*John Wilmers* in reply. *Board of Education* v. *Rice* [4] shows that if the tribunal use evidence of their own they must give the tenants an opportunity of dealing with it. *Rex* v. *Lincolnshire Justices, Ex parte Brett* [5] shows that certiorari can lie on collateral facts.

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[2] [1951] 2 K.B. 1; [1951] 1 T.L.R. 423; [1951] 1 All E.R. 482.

[3] [1950] 2 K.B. 410; 66 T.L.R. (Pt. 2) 9; [1950] 1 All E.R. 946.

[4] [1911] A.C. 179; 27 T.L.R. 378.

LORD GODDARD C.J. In spite of a very interesting and well-sustained argument by Mr. Wilmers, I have no doubt that the court cannot grant certiorari in this case.

The case arises in this way: the persons on whose behalf the order is sought are tenants of a block of flats, and the landlords claim that the cost of the services which they render, either pursuant to the contract of letting or because in fact they provide the services, have increased beyond what they were at the material time, September, 1939, and, therefore, they claim to be entitled to be paid an extra sum in consideration of their continuing to give these services. Accordingly, they applied to the tribunal which was set up under the Furnished Houses (Rent Control) Act, 1946. It is first necessary to see what jurisdiction the tribunal had; secondly, how it was exercised and what order they made. The jurisdiction is given to the tribunal by section 40 of the Housing Repairs and Rents Act, 1954, which provides: "(1) The following provisions of this section shall have effect "where a dwelling-house is let under a controlled tenancy or is "occupied by a statutory tenant, and—(*a*) the standard rent of "the dwelling-house is the rent at which it was let on a letting "beginning on or before September 1, 1939, or an amount ascer-"tainable by apportionment . . ." First, therefore, it must be a controlled tenancy, secondly, the standard rent must be the rent at which it was let on or before September 1, 1939. Thirdly, "of a rent at which a property comprising the dwelling-house "was let on such a letting as aforesaid (whether such an appor-"tionment has been made or not), and (*b*) services for the tenant "are under the terms and conditions of the letting to be provided, "or are provided, by the landlord." In other words, the landlord may be contractually bound to provide services or in fact he may provide them, as is very often done in these cases. We know that, in cases which have come before the court under various other Acts, it is not uncommon to find that, although the landlord always did provide hot water to the tenants, he was under no covenant to do so, and that is what paragraph (*b*) of subsection (1) is aimed at. If those three conditions are fulfilled the section continues: "(2) If . . . (*b*) on an application by the landlord the

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[5] [1926] 2 K.B. 192.

"tribunal constituted under the Act of 1946 for the district in "which the dwelling-house is situated has at any time after "the commencement of this Act determined as respects the said "services that in all the circumstances it is just that the landlord "should be entitled to an increase of rent, of an amount specified "in the determination, in respect of any such rise as aforesaid, "the landlord shall be entitled to recover the amount of the "increase agreed or determined as aforesaid notwithstanding "anything in the terms of the tenancy or statutory tenancy or "any enactment, subject, however, to the provisions of the next "following subsection. . . . (5) Before determining any application under paragraph (*b*) of subsection (2) of this section the "tribunal shall make such inquiries (if any) as they think fit and "shall give the landlord and the tenant an opportunity of being "heard or, at the option of the party, of submitting representations in writing."

In the present case the landlords were represented before the tribunal by somebody from the office of an estate agent, one Patterson. He did not appear to understand the Act or, if he did, he got most of his figures wrong, and at the end of Mr. Wilmers' cross-examination there was precious little left of Patterson, because to most questions he said: "I have never thought of "that," or "I have not the proper information about that." If I had been a member of the tribunal I should not have paid any attention to what Patterson said or to his figures. The tenants were called to say how very bad the flats were. There was no other evidence given, but there need not be any evidence for the tribunal to act. The tribunal has jurisdiction if the three requisites I have mentioned are fulfilled. Having got jurisdiction, it is for them to proceed in the way laid down in the Act to decide whether there has been a rise and, if so, what in all the circumstances it is fair that the landlord should be entitled to in respect of that rise.

As we pointed out in *Rex* v. *Brighton and Area Rent Tribunal, Ex parte Marine Parade Estates (1936) Ltd.*[1]—in which the court would certainly have interfered if they could have done so—these tribunals are given wholly peculiar powers by Parliament, because they are not bound to act upon evidence. They are not bound to act on any particular principles. All that has to be done, provided the property into which they are asked to inquire is within their jurisdiction, is to make such inquiries as they like. They can act on their own views, knowledge and opinions. Provided that appropriate notice has been given, they do not have to hear evidence. The only thing that they must do is to give the tenant and the landlord an opportunity to lay their views before them. They need not even hear the landlord or the tenant unless they wish to come. If the landlord and tenant like to put forward their views in writing, the tribunal must consider them, but they can act exactly as they like.

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[1] [1950] 2 K.B. 410; 66 T.L.R. (Pt. 2) 9; [1950] 1 All E.R. 946.

Mr. Wilmers has urged upon us that although that may be true, on matters collateral, which is an expression which I agree has been used in many of these cases, it is open to this court to review the findings of this tribunal. The matters which are called collateral are matters which go to show whether the tribunal has jurisdiction or not. These tribunals only have the special jurisdiction given to them by Act of Parliament. In the present case they have jurisdiction if the three conditions are fulfilled. Once that is shown, and that the property falls within those three headings, the tribunal has power to consider whether there has been a rise in the services.

It is not necessary to go at length into the particular services provided by the landlords because the tribunal have given a decision in which they have set out in detail in a schedule the services in respect of which they have made their award. They have divided the services into two classes, the contractual services and the non-contractual services, and no one has said that they have included among those services any services which are not in fact rendered or which are not contracted to be rendered. It is true that Mr. Wilmers has said that some of the services ought to be regarded as maintenance and not services. I cannot agree with him on that. The contractual services set out are central heating, constant hot water, passenger and service lifts, lighting and heating of lounge, hall, passages and staircases. Every one of those seems to me to be a contractual service. If the landlord has contracted to provide a lift, the maintenance comes under services because the lift has to be worked. It is a service for the tenant. I should have thought that one of the most important services is the provision of a lift.

Then the non-contractual services provided are porterage, cleaning common parts, removal of refuse, pest control, floor coverings to common parts. The only one about which I should have thought there was the least question is the floor coverings to common parts, but that is just as much a service as heating and lighting the staircase; it is an amenity which gives a better appearance to the place. Tenants do not want to walk up uncarpeted stairs, and the provision of carpets seems to me to be as much a service as anything else.

Mr. Wilmers says that he wishes to go behind the schedule and to show that the tribunal have awarded too large a rise because, he says, he can show by an analysis of the figures that they must have taken into account matters which they ought not to have taken into account, particularly matters relating to the upkeep of the boilers, and so forth, which are properly maintenance. But where the tribunal has jurisdiction, and in the exercise of that jurisdiction make what a party considers an error, that is not a ground for certiorari; that is a ground of appeal. I have often thought that in this class of case, though I dare say there are good grounds of policy the other way, it would have been a good thing if Parliament had provided for an appeal, but they have not. The only thing that can be done is to apply for certiorari, and the remedy of certiorari, however it is looked at, is a remedy granted by this court where the tribunal has exceeded its jurisdiction. I think that if one goes into the history of certiorari to quash—of course it is different in the case of certiorari to remove—it is always brought down in the end to a matter of jurisdiction. I pointed out the other day in a case that if certiorari is moved because of the bias of a justice, the theory that lies behind that is that if a justice is biased, he is, in effect, a judge in his own cause and, as no one can be a judge in his own cause, certiorari will be granted because the justice had no jurisdiction as he was sitting in a matter in which he was interested. So in *Reg.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller*,[2] where we applied the same principle as with regard to bias, a case in which it was alleged that matter had been given to the recorder which he ought not to have received. There it was a case of prejudice, and the recorder, if he was prejudiced, would not be sitting as an impartial judge. It all really comes back again to jurisdiction.

Here, it seems to me that the tribunal obviously had jurisdiction because the conditions precedent to jurisdiction were all fulfilled. Whether they decided rightly or wrongly within their jurisdiction is not a matter which can be brought up before this court. It may be that if on the face of the order we could see that they had taken something into account that was not a service at all, or if they had put in some remark that they increased the amount because they thought it was only fair that the tenants should pay more money now than they did before, it may be that the court could say: "You are acting without jurisdiction," but here on the face of the order, and so far as it is a speaking order, it tells us that they have awarded a sum of £23 in one case and other sums in other cases in respect of the rise in cost of the two different classes of services.

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[2] [1955] 3 W.L.R. 563; [1955] 3 All E.R. 300.

For these reasons, whether the tribunal came to a right conclusion or not, it is not a matter with which this court can deal by certiorari. We are very often asked to grant certiorari on grounds which in truth are grounds of appeal. We cannot sit here as a court of appeal because Parliament has not chosen to give an appeal from the decision of these tribunals. These tribunals, one may say, are a law unto themselves. They do not sit as courts. They are called tribunals, I suppose, because in some respects they are the antithesis of courts. They do not act on any settled principles. They do not have to take evidence according to law. It is true, as Mr. Wilmers pointed out, that in this particular case the chairman of the tribunal very fairly and properly said to Patterson that he was not going to pay any attention to some matters which Patterson put before them because, he said, he did not think that they were matters which the tribunal ought to take into account. That is ruling out some evidence, but they are in a position that they can make such inquiries as they think fit and, having made such inquiries, it is not obligatory on them to hear any evidence at all and, having heard the parties, they were, in my opinion, acting clearly within their jurisdiction. I can see nothing on the face of their order to show that they were including among services anything that was not a service.

Therefore, whether another tribunal would have come to a different conclusion as to amount is neither here nor there. We cannot sit here to go into mathematical calculations or consider Patterson's evidence, which I should think had better be ignored altogether. The tribunal have said that on their inquiry and experience in these matters they have come to the conclusion that a certain sum should be allowed in respect of the matters set out and, in my opinion, we cannot interfere with that, and the application must be refused.

ORMEROD J. I agree, and there is only one short point on which I would add a word. Mr. Wilmers in the course of his argument took two points on the face of the schedule itself.

First, he said that the services could not be regarded as services because they must have included, having regard to the result at which the tribunal arrived, certain repairs which were not within the terms of the inquiry of this particular tribunal. That, as has been pointed out, is certainly not a matter with which this court can deal on an application for certiorari. On the face of the document those matters are services and, therefore, the document is sufficient in itself.

Secondly, he said that some of the matters set out in the document could not be services because they are contrary to the definition of " services " contained in section 12 of the Furnished Houses (Rent Control) Act, 1946, which defines services as including " attendance, the provision of heating or lighting, the " supply of hot water and any other privilege or facility connected " with the occupancy of a house or part of a house, not being a " privilege or facility requisite for the purposes of access, cold " water supply or sanitary accommodation." He argued that the items of lighting and heating of the lounge, hall, passages and staircases came within those last words and therefore could not be services within the meaning of section 40 of the Act of 1954. I think it is extremely doubtful on any showing that those items would come within the words " not being a privilege or facility " requisite for the purpose of access . . ." In any event, that is a different statute passed to deal with a different matter, and I see no reason why that definition should be incorporated into the Act of 1954 in order to exclude the matters in question from the definition of " services." On the face of the document all these matters appear to be services and therefore matters which it was well within the jurisdiction of this tribunal to consider. I agree that this application must be refused.

GLYN-JONES J. I agree. Mr. Wilmers argues that it is a condition precedent to the jurisdiction of the tribunal that it should be established that there has been a rise in the cost of the services between September 3, 1939, and 1954. He even goes further than that; he contends that the amount of the rise must be capable of assessment as an exact sum of money before the tribunal makes an order as to what the increase of rent should be in respect of the increase in the cost of those services. Assuming that he were right in saying that it was a condition precedent that those facts should be ascertained, I cannot see why the facts are not facts into which the statute directs the tribunal to inquire. If they are facts into which the tribunal should inquire, it seems to me that the situation is covered by a sentence taken from Halsbury's Laws of England, 1st ed., tit. Crown Practice, vol. X, § 375, approved by Atkin L.J. in *Rex* v. *Lincolnshire Justices, Ex parte Brett*,[3] namely: " . . . if the fact in question "—that is the fact upon which the jurisdiction of the tribunal depends—" be not collateral, but a part of the very issue which the lower " court has to inquire into, certiorari will not be granted, although " the lower court may have arrived at an erroneous conclusion " with regard to it." It seems to me to be perfectly clear that it must be the intention of Parliament that it is for the tribunal to consider whether or not there has been a rise in the cost, and if there has been a rise, what increase it is just the landlord should be allowed to put on the rent in all the circumstances of the case. I agree that the three facts which give jurisdiction to the tribunal are contained in subsection (1) of section 40 of the Act of 1954 and, upon those facts being established, the tribunal on the landlord's application may inquire into the question of whether or not there has been a rise and may arrive at whatever conclusion they think just, and their decision cannot be interfered with by certiorari.

As to the second limb of Mr. Wilmers' argument, I think there is a great deal of force in what was said to us by Mr. Winn, namely, that in the absence of any definition in the statute we are considering of what are " services," it may well turn out that the cost of keeping a lift in running order, that is to say, the cost of running the lift, is part of the cost of providing the service. I agree with the judgments delivered.

LORD GODDARD C.J. We do not propose in this type of case to award two sets of costs. The Ministry and the respondents should agree between themselves who is to appear, as it is not necessary for both the tribunal and the respondents to be represented. We will therefore order that the applicants pay the landlords' costs only, and will make no order as to the Ministry's costs.

*Application dismissed.*

Solicitors: *T. F. Peacock, Fisher, Chavasse & O'Meara; Solicitor, Ministry of Health; Parker, Sloan & Pinsent.*

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[3] [1926] 2 K.B. 192, 202.

## SANDLAND *v.* NEALE.

1955
*Oct.* 27;
*Nov.* 4.

Lord Goddard C.J., Ormerod and Barry JJ.

*Road Traffic — Notice of intended prosecution — Service of notice—Defendant in hospital seriously injured during statutory period —Impossible to serve notice on him personally—Notice sent to him at his usual residence—Validity of notice—Dangerous driving—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

On January 23, 1955, the defendant was seriously injured in a car accident and taken to hospital, where he remained for two months. In view of his condition the police thought it improper and unwise to serve a notice of intended prosecution under section 21 of the Road Traffic Act, 1930, on the defendant personally within the period of 14 days required by the statute, and the defendant would not have understood it if the notice had been served on him then. The police, having ascertained that the defendant's wife was living at the defendant's usual residence, sent the notice, addressed to the defendant, at his home on February 2, where it was received on February 3. The notice was not received personally by the defendant until after the expiration of the statutory period of 14 days:—

*Held* (Barry J. dissenting), that whether the defendant received the notice within the 14 days was immaterial since it was the sending and not the receipt of the notice which was decisive, and provided the police acted reasonably, as they had done in the present case, the requirements of section 21 were complied with.

*Holt* v. *Dyson* [1951] 1 K.B. 364; 66 T.L.R. (Pt. 2) 1009; [1950] 2 All E.R. 840 distinguished.

*Stanley* v. *Thomas* [1939] 2 K.B. 462; 55 T.L.R. 711; [1939] 2 All E.R. 636 considered.

CASE STATED by Wallasey justices.

Charles Thomas Sandland, the prosecutor, preferred an information against Alexander Neale, the defendant, charging him with driving a motor-vehicle in a manner which was dangerous to the public, having regard to all the circumstances of the case, contrary to section 11 of the Road Traffic Act, 1930.

By agreement between the parties the justices agreed to decide, as a preliminary point, whether the notice of intended prosecution had been validly sent to the defendant in accordance with section 21 of the Road Traffic Act, 1930.[1] It was agreed

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[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for "an offence under any of the provisions of this Part of this Act "relating . . . to reckless or "dangerous driving . . . he shall "not be convicted unless either— "(*a*) he was warned at the time "the offence was committed that the "question of prosecuting him for an "offence under some one or other of "the provisions aforesaid would be "taken into consideration; or . . . "(*c*) within . . . 14 days a notice of

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by the solicitor for the prosecutor that if such notice had not been validly sent to the defendant in accordance with section 21, the requirement of the section had not been complied with.

The following facts were proved or admitted before the justices: The defendant was involved in an accident giving rise to the information at about three minutes past midnight on Sunday, January 23, 1955, and as a result was so severely injured that it was not possible pursuant to section 21 (*a*) to warn him at the time the alleged offence was committed that the question of prosecuting him for an offence would be considered. The defendant was removed to the Victoria Central Hospital, Wallasey, where he was detained from January 23 to March 23, 1955. A police officer saw the defendant on January 23 and on February 2 at the hospital, and on each occasion attempted to hold a conversation with him, with the consent of the doctor, but the attempted conversations were unsuccessful, because of the physical and mental condition of the defendant, who was suffering from severe spinal injuries. The defendant had no recollection of having conversations with the police officer on those dates but remembered seeing a constable at the door of the ward, which he thought was two or three weeks after he was admitted. The police officer formed the view that the defendant was incapable of appreciating what was being said to him on those two dates. The police officer also formed the view that to have served a notice of intended prosecution personally on the defendant on February 2 would have been improper and unwise, having regard to his view that owing to the defendant's physical and mental condition it was unlikely that he would have understood the notice, or that if he had understood it, the receipt thereof might seriously have upset the defendant. The police officer made inquiries at the hospital, from which it appeared to him that the defendant was likely to be detained for some time. The police officer had ascertained between January 23 and February 2, 1955, that the defendant's wife was living at the defendant's usual residence at 145, Leasowe Road, Wallasey. On February 2, and immediately following the police officer's visit to the defendant, the prosecutor sent a postal packet by prepaid registered post addressed to the defendant at his usual residence at 145, Leasowe Road, containing a notice of intended prosecution, and specifying the nature of an alleged offence contrary to section 11

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"the intended prosecution specifying "the nature of the alleged offence "and the time and place where it "is alleged to have been committed "was served on or sent by registered "post to him . . ."

(1) of the Act of 1930, and the time and place where it was alleged to have been committed. The postal packet containing the notice was duly received at Leasowe Road in the ordinary course of registered post on February 3, 1955. The notice of intended prosecution was not received personally by the defendant until after the expiration of the statutory period of 14 days from the date of the accident.

It was contended by the prosecutor that as he had made inquiries as to the defendant's condition, and knew that the defendant's wife was residing at his usual residence, the prosecutor acted properly and in accordance with the provisions of section 21 of the Act of 1930 in sending the notice of intended prosecution by registered post on the tenth day after the alleged offence to the defendant's usual residence; that to have sent the notice to the defendant at the hospital would have resulted, either in the receipt of the document which the defendant would not have understood, or, if he had understood its nature, it would probably have upset him, or it might not have been delivered to the defendant personally, whereas sending it to the defendant's usual residence would and did result in its receipt by the defendant's wife.

It was contended for the defendant that the notice of intended prosecution would have been properly served if it had been sent by registered post to the defendant at the hospital, or if it had been handed to him personally within 14 days of the date of the accident; that the notice was not properly served by sending it to the defendant's usual residence, because the prosecutor sent it to an address to which he knew the defendant would not be returning until long after the expiry of the period of 14 days referred to in section 21; that although the postal packet was in fact delivered at the defendant's usual residence, the defendant's wife was not his agent to receive the notice, she did not in fact hand it to the defendant within the statutory period, and the prosecutor had no reasonable grounds for thinking that she would do so within such period.

The justices were of the opinion that the notice of intended prosecution had not been properly sent to the defendant in accordance with the requirement of section 21 of the Act of 1930 and, accordingly, dismissed the information.

The prosecutor appealed.

*Frank D. Paterson* for the prosecutor. The short point is whether a notice of intended prosecution under section 21 of the

Road Traffic Act, 1930, which was sent by registered post to the defendant's home at a time when he was seriously ill in hospital, was "sent by registered post to him" within the meaning of section 21 (*c*). Although *Holt* v. *Dyson* [2] (in which *Stanley* v. *Thomas* [3] was distinguished) at first glance appears to be contrary to the prosecutor's contention that there was here a compliance with the section, it is submitted that it can be distinguished because in that case the police officer had had an interview in hospital with the defendant, who could understand what was happening. In the present case the police were in a dilemma, because if they had sent the notice to the hospital it did not necessarily mean that the defendant would have received it.

Section 26 of the Interpretation Act, 1889, provides that service by post "shall be deemed to be effected by properly "addressing, prepaying, and posting a letter containing the docu- "ment" to be served. The matter must in each case depend on whether the police acted reasonably. If they acted in a way in which they knew that the defendant would not receive the notice, they were not complying with section 21. In this case they sent the notice to the defendant at his home, where they knew that his wife was residing, and thought that she would give it to the defendant when he was well enough, and therefore it is submitted that the notice was validly sent to him within the terms of the section.

*R. Gordon Clover* for the defendant. The requirement in section 21 is absolute and the notice must be sent to the defendant wherever he is and whether he will understand it or not. It does not depend on whether the police acted reasonably. There is no provision in the section that the defendant must receive the notice. In *Clarke* v. *Mould* [4] it was held that a notice which was sent to a firm at their business address in Grantham was not "sent" to the defendant, a partner in the firm, who lived at Bottesford, and therefore was not in compliance with the section. If the words in section 21 are strictly construed, the police are in no difficulty whatsoever; all that they had to do was to send the notice to the hospital. Even if he had not then received it within the 14 days the police would, nevertheless, have complied with the requirement of the section. In fact they sent it to an address where they knew the defendant was not staying. Had the prosecutor's submission, that the notice was sent to the defendant, been sound it would have been advanced in *Holt* v. *Dyson*,[5] which is indistinguishable from the present case. The fact that in the present case the wife was at the defendant's home is quite irrelevant. It is not to be assumed that his wife had been given authority to open his letters. Had the requirement been that the police should take reasonable steps, then no doubt what they did would have been sufficient. In this case the police were really recognizing that they could not inform the defendant within the 14 days and therefore they sent the notice to his wife.

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[2] [1951] 1 K.B. 364; 66 T.L.R. (Pt. 2) 1009; [1950] 2 All E.R. 840.

[3] [1939] 2 K.B. 462; 55 T.L.R. 711; [1939] 2 All E.R. 636.

[4] (1945) 173 L.T. 370; [1945] 2 All E.R. 551.

*Cur. adv. vult.*

Nov. 4. The following judgments were read.

LORD GODDARD C.J. stated the facts and continued: Whether or not the defendant received the notice within 14 days is immaterial; the section requires the notice to be sent within that time; it says nothing about receipt, and for the obvious reason that the person to whom it is sent may be away from home when the letter is delivered. But it is said that in this case the police officer knew that the defendant was not only not living at home when the letter was sent but was actually in hospital, which was the only place therefore to which the letter could be sent to comply with the section, and reliance is placed on the decision of this court in *Holt* v. *Dyson*.[1] Before I deal with that case there are one or two pertinent observations that may be made. The object of section 21 is, of course, plain; it is to let the offender know promptly that he may be prosecuted so that he may be able to collect material for his defence while the matter is fresh in his memory and that of potential witnesses, so the sooner the notice is given the better. But if a man is lying unconscious, or even in a partially unconscious condition, for the whole of the 14 days, the service on him during that period is of no practical use to him unless someone can act on his behalf and will do so. For instance, an injured man might be taken to his home, but if the only occupant of his house is a housekeeper, it is unlikely that she would open his registered letters, nor would a doctor in attendance on him during the period when he could not attend to them be likely to do so. But compliance with the Act must still be made.

[5] [1951] 1 K.B. 364.

[1] [1951] 1 K.B. 364.

The Interpretation Act, 1889, provides that service by post shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document to be served, but that does not solve the question what properly addressing is. It is true that in *Stanley* v. *Thomas* [2] Lord Hewart C.J. said that he thought that all that is meant by properly addressing was confined to the accuracy and propriety of the address, and not to any circumstances affecting the question whether the letter was being sent to the proper destination. I confess I have difficulty in understanding this, for it seems to me that the propriety of the address and the proper destination are the same thing.

I therefore turn at once to the two cases on this subject, *Stanley* v. *Thomas* [3] and *Holt* v. *Dyson*,[4] where the former case was distinguished. In the former, the driver was interviewed in hospital on September 14 within the 14 days which expired in that case on September 22. A notice had been posted to him at his usual residence on September 13, and was not returned to the police as undelivered till September 23. It was held that, although he was well enough to be interviewed on September 14, the notice sent to his home while he was still in hospital was duly sent. The court said that it was posted at a time when it might well have been expected to reach him in the ordinary course named in the statute. Lord Hewart C.J.[5] went on to say that other considerations no doubt would apply if it appeared that the sender deliberately sent it to a place where he knew the intended recipient was not, or was not likely to be, and from this, and a further passage in the judgment, emphasis is being laid on the fact that there must be no deliberate attempt to defeat the intention of the statute. And he said other considerations may apply where the circumstances are different.

It was because the court in *Holt* v. *Dyson* [6] considered that the circumstances there were different that they distinguished the two cases. In *Holt* v. *Dyson* [6] the injured woman lived in Worthing; the accident took place in Hove, and she was in hospital at Hove. She was interviewed in hospital seven days after the accident and was well enough to be told orally that a prosecution would be considered. Then, within 14 days, namely, on November 28, a notice was sent to her house at Worthing which was not returned as undelivered till December 9, while she was still in hospital, and it was held that the notice was not properly sent. We distinguished the case from *Stanley* v. *Thomas* [7] because we thought that there the court considered that the police might reasonably think the man might be back home before the time expired. In *Holt's* case,[8] not only did they know that the woman would not be at home, but no inquiry was made as to whether letters would be received or if anyone was in charge at her home, and the notice was sent only three days before the time would expire.

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[2] [1939] 2 K.B. 462, 466.

[3] [1939] 2 K.B. 462.

[4] [1951] 1 K.B. 364.

[5] [1939] 2 K.B. 462, 467.

[6] [1951] 1 K.B. 364.

In the present case, the police had made inquiries and had ascertained that the defendant's house, which was in the borough where the accident happened, was open, and that his wife was living in it. She, in fact, took in the letter. In my opinion it is much too technical to hold in these circumstances that the notice was not sent to him within the specified time. It is the sending and not the receipt that is decisive. In ordinary parlance a letter is sent to a person if it is sent to his ordinary residence. True the police knew that he was in hospital, but in a state unfit to receive or attend to a letter. What better or more reasonable thing could they do to implement the intention of the section than to send it where it would be received by his wife, who might well be supposed to be ready to deal with anything urgent while her husband lay unconscious. In such circumstances, to put forward arguments as to whether a wife is her husband's agent to do this is to ignore reality; we are not dealing with a commercial or business matter.

It was argued that there was nothing in the section which entitled the court to consider whether the police acted reasonably. I do not agree. The section requires the notice to be "sent by "registered post to him." It does not say where. It does not say to the last known address, but surely no one could contend that if it was sent to his ordinary address the fact that he was away on a holiday would make the service bad; it is the sending, not the receipt, as I have already emphasized, that is material. It was because the court thought that the police had not acted altogether reasonably in *Holt's* case [8] that the service was held to be bad. Here the police have taken the course which was most likely to effect that which the section aims at. The illustration I gave in *Holt's* case [9] of a resident in Cornwall meeting with an accident while staying in Northumberland, I think shows that reasonableness must be a consideration in a matter of this sort. In my opinion, the duty is performed if the notice is sent to the alleged offender wherever it is most likely to come to his attention within the specified time. If his condition is such that wherever it is sent he will be unable to appreciate or act upon it, I do not think it can make any difference whether it is sent to the hospital where he is lying unconscious, or to his home where his family are living, though the latter is preferable, as it is quite possible that they will take any action that may be open in his interest. I recognize that the two cases to which I have referred may cause difficulty for justices, and it is no reflection on them that we are taking a view differing from them. I hope this judgment may perhaps make it easier for them in the future. In my opinion, the appeal should be allowed.

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[7] [1939] 2 K.B. 462.

[8] [1951] 1 K.B. 364.

[9] Ibid. 367.

ORMEROD J. I agree with the judgment of Lord Goddard C.J., and wish to make only one short observation. The section provides that notice of an intended prosecution must be served on the defendant or sent to him by registered post within 14 days of the commission of the offence. In *Holt* v. *Dyson* [10] Lord Goddard C.J. said that the police must act reasonably in these matters. It may be that if the police had sent the notice to the hospital where they knew the defendant was, the magistrates might properly have found that the police were complying with the section. But that does not, in my view, mean that because the police did not adopt that course, but sent the notice to his home, after making proper inquiries, they were not acting in pursuance of the section. The two findings are not mutually exclusive, and to have taken either course in this case would, in my opinion, have been a proper compliance with the section. I agree that the appeal should be allowed.

BARRY J. In this case I have the misfortune to differ from my brethren as to the proper construction of section 21 of the Road Traffic Act, 1930. I agree that the police acted in a humane and reasonable manner, and that the course which they adopted in regard to the sending of the notice was at least as likely as any other to bring it to the attention of the defendant within 14 days, if he had recovered sufficiently during that period to appreciate its contents.

The reasonableness or otherwise of the conduct of the police is, no doubt, a matter to be taken into account, but only in considering whether or not they have complied with the requirements of the Act. If the notice of intended prosecution has not been sent to the accused person in the manner prescribed by section 21 (*c*) of the Act of 1930, there can be no conviction. No question arises here as to the form or contents of the notice. It was properly sent by registered post, and the only point at issue is whether or not it was sent to the defendant. The justices have decided that it was *not*, and I am bound to say that I agree with their decision.

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[10] [1951] 1 K.B. 364, 367.

Before the decision of this court in *Holt* v. *Dyson*,[11] it might reasonably have been suggested that, in the absence of bad faith on the part of the sender, a notice was sent to the accused as required by the statute if it was properly addressed and posted to him at his normal place of residence. It is clear from *Holt* v. *Dyson* [11] that this is not the correct interpretation of the Act in cases where the police are well aware that the accused person is not living at his usual address, but at a known address, such as a hospital, elsewhere, and there is no expectation of his returning to his normal residence during the statutory 14-day period within which the notice must be sent. In such circumstances, it was decided by this court that the notice must be sent to the place where the accused was known to be.

So far as I can ascertain, the only feature which distinguishes the present case from *Holt* v. *Dyson* [11] is that here the police made proper inquiries and satisfied themselves that the defendant's wife was living at his home. In *Holt* v. *Dyson* [11] no effort was made to discover whether anyone was living at Miss Dyson's home, and it was, in fact, unoccupied.

Speaking for myself, I cannot accept the view that this one difference between the two cases has in law any real significance. A wife, as I see it, is not an agent authorized to receive communications of this kind on behalf of her husband, and, in any event, the Act requires the notice to be sent to the accused and not to his agent. If the presence of his wife in the defendant's home distinguishes this case from *Holt* v. *Dyson*,[11] what would be the position if the mother or sister of the accused person were known to live at his address? It might also be reasonable for the police to assume that such a person would be likely to give the notice to the accused as soon as he was fit to receive it. If, on the other hand, the occupant were a housekeeper or domestic servant, it might be even more reasonable to send the

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[11] [1951] 1 K.B. 364.

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SANDLAND v. NEALE.

Barry J.

notice to the address of the mother or sister, or even to that of his solicitor.

I fully appreciate that in the present case the point taken on the defendant's behalf is both technical and unmeritorious. None the less, with the greatest respect for the views expressed by my brethren, I fear that it may lead to confusion if the principle established by *Holt's* case [11] is qualified by the consideration of what may or may not be reasonable in any particular case. For myself, I would prefer to establish the simple rule that the notice must be sent to the accused person at the address at which he is actually living, and will in all probability continue to live, during the statutory 14-day period, if that address is actually known to the police. Unless the accused is in hospital, or is known to be living at some address other than his own, the notice would normally be sent to his usual residence. Provided that the notice is properly sent, the requirements of the Act have been observed, and the failure of the accused to receive it will not be a bar to prosecution.

*Appeal allowed.*

Solicitors: *Kinch & Richardson for Percy Hughes & Roberts, Birkenhead; Carpenters for Laces & Co., Liverpool.*

C. J. E.

[11] [1951] 1 K.B. 364.

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C. A.

1955 *Oct.* 10, 11.

Denning, Hodson and Morris L.JJ.

## SILLS *v.* WATKINS.

[Plaint No. L. 430.]

*Landlord and Tenant—Rent restriction—Alternative accommodation—Dwelling-house required by landlord—Offer of council house in adjoining housing area—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3.

In the absence of a certificate within the terms of subsection (2) of section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933,[1] a council house is not "suitable alternative

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[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3: "(1) No order or judgment for "the recovery of possession of any "dwelling-house to which the prin- "cipal Acts apply . . . shall be made

"accommodation" within the meaning of that section, because it does not by its terms afford reasonable security of tenure.

The landlord of a dwelling-house protected by the Rent Acts which was situated in the municipality of T. sought to obtain possession, as he required the house for his own occupation. In proceedings in the county court he offered to give in exchange as "suitable alternative accommodation" possession of a council house occupied by him in the adjoining municipality of S.; this house, so far as rent and situation were concerned, was suitable to the tenant's requirements, and there was evidence that the S. council would be prepared to accept the defendant as a tenant, but no certificate under section 3 (2) of the Act could be obtained, as the houses were in different housing areas. The county court judge made an order for possession. On an appeal by the tenant:—

*Held*, that as the house offered by the landlord was a council house, the occupation of which was subject to a week's notice, the proposed tenancy would not be on terms which would afford to the tenant reasonably equivalent security of tenure, so that an order for possession ought not to be made.

APPEAL from Judge Reid, sitting at Kingston-on-Thames County Court.

The tenant, a schoolmaster employed by the Surbiton council, had for some years occupied a rent-controlled flat over a butcher's shop in Thames Ditton. In 1953 the premises were acquired by the landlord, who carried on the butcher's business. In 1955 the landlord wished to get possession of the flat; he occupied a council house in Surbiton, and made an offer to the tenant to vacate the council house in his favour. The tenant refused, and the landlord took proceedings in the county court for possession.

The council house in Surbiton was let at a rent appropriate to the tenant's means and was conveniently situated for his work. At the hearing a housing officer of the Surbiton council stated in

"or given unless . . . (*b*) the court "is satisfied that suitable alternative "accommodation is available . . . "(2) A certificate of the housing "authority for the area in which "the said dwelling-house is situated, "certifying that the authority will "provide suitable alternative accommodation for the tenant by a date "specified in the certificate, shall be "conclusive evidence that suitable "alternative accommodation will be "available for him by that date. "(3) Where no such certificate as "aforesaid is produced to the court, "accommodation shall be deemed to "be suitable if it consists either— "(*a*) of a dwelling-house to which the "principal Acts apply; or (*b*) of premises to be let as a separate dwelling on terms which will, in the "opinion of the court, afford to the "tenant security of tenure reasonably "equivalent to the security afforded "by the principal Acts in the case of "a dwelling-house to which those Acts "apply, and is, in the opinion of the "court, reasonably suitable to the "needs of the tenant and his family "as regards proximity to place of "work . . ."

evidence that his council viewed such exchanges with favour, and that the tenant, as their employee, would be considered as a suitable tenant, but he was unable to state with certainty that the tenant would be given possession of the landlord's former house. The landlord was unable to produce a certificate under section 3 (2) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that the Surbiton council would "provide suitable alternative accommodation" as the two houses concerned were situated in different housing areas.

On May 13, 1955, the judge made an order for possession to take effect on February 1, 1956. The tenant appealed.

*D. M. Wacher* for the tenant. There was no proper evidence on which the judge could find that alternative accommodation was available at all. The view expressed by the housing officer was not proper evidence; *Andrew* v. *Baker*[2] shows that it is wrong to make an assumption that a local authority will find accommodation for one of their officers.

Secondly, as the proposed alternative accommodation was a council house, it was not "suitable" as it did not afford any security of tenure. Council houses are not protected under the Rent Acts and are occupied on weekly tenancies determinable at any time by the council. *Scrace* v. *Windust*[3] shows that it is not sufficient to offer an unprotected tenancy for one which is protected; that case was distinguished by the judge below, as he considered that local authorities never turned out good tenants; but when exchanging houses a tenant is entitled to the security of the Acts and cannot be required to rely on the mere goodwill of a local authority. The word "terms" in subsection (3) (*b*) means some contractual right on which the tenant can rely, and a local authority has no power to let houses for a term of years giving security of tenure.

*A. C. Warshaw* for the landlord. The word "terms" should not receive a narrow construction; the court has to see that the alternative accommodation offered is broadly equivalent, not that there should be a contractual security of tenure. By subsection (2) a certificate that the local housing authority will provide a council house is conclusive evidence of suitability; that shows that it is in the contemplation of the Act that such accommodation is suitable, and the section should be construed accordingly.

As a matter of practice it is well known that local authorities do not evict satisfactory tenants. In *Shelley* v. *London County Council*[4] (which was affirmed in the House of Lords[5]) Lord Greene M.R. pointed out[6] that local authorities were excepted from the Rent Acts as they were socially responsible landlords whose duty it was to provide housing for persons of the type living in protected houses. It might be contended that subsection (3) (*b*) should not be regarded as exhaustive, but rather as indicating one requirement which the court can impose in the absence of a certificate or of the offer of another rent-controlled house. But the weight of authority is against such a construction; in *Sheehan* v. *Cutler*[7] Morton L.J. said that the subsection was intended to give a comprehensive definition of " suitable alternative accom- " modation " not falling within subsection (2), a view with which Cohen L.J. agreed in *Standingford* v. *Probert*,[8] though Somervell L.J. in *Barnard* v. *Towers*[9] expressed a contrary view. Assuming that the subsection is exhaustive, the facts bring the case within its terms; in all lettings by a local authority there must be an implied term that the landlords will observe the terms of the Housing Acts; if they seek to evict a tenant for some improper reason, that must be a ground for an injunction by the court, as a local authority cannot be performing its duties under the Acts if it takes such a course. Common sense requires that council house terms must be regarded as satisfactory; it was so held in *Thomson* v. *Brady*,[10] which was relied on by the judge below.

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[2] (1946) 175 L.T. 95.

[3] [1955] 1 W.L.R. 475; [1955] 2 All E.R. 104.

*Wacher* replied.

DENNING L.J. The tenant is a schoolmaster at the Surbiton Grammar School, and some five or six years ago he obtained a flat in a house at Thames Ditton for which he paid a rent of 30s. a week. In 1953, after he had been there a few years, the whole house was bought over his head by the landlord, who is a butcher. There is a butcher's shop underneath the flat, where the landlord is carrying on his butcher's business, and he now seeks to get possession of the flat for occupation by himself and his family. He cannot obtain possession of this flat unless he can satisfy the requirements of the Rent Acts, which say that he is not entitled to it unless he can show that suitable alternative accommodation is available for the tenant.

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[4] [1948] 1 K.B. 274; 64 T.L.R. 22; [1947] 2 All E.R. 720.

[5] [1949] A.C. 56; 64 T.L.R. 600; [1948] 2 All E.R. 898.

[6] [1948] 1 K.B. 274, 283.

[7] [1946] K.B. 339, 343; 62 T.L.R. 261.

[8] [1950] 1 K.B. 377, 385; 65 T.L.R. 704; [1949] 2 All E.R. 861.

[9] [1953] 1 W.L.R. 1203, 1204; [1953] 2 All E.R. 877.

[10] 1927 S.L.T.(Sh.Ct.) 20.

The landlord is himself living in a council house in Surbiton, and he offers the tenant his council house. The rent of the council house is 6s. 10d. a week more than the flat, but it is a reasonable rent in the circumstances, and suitable to the tenant's means. The landlord has called the housing officer of the Surbiton council to say that the local authority are disposed to favour exchanges of houses if both parties agree to it; and the housing officer thinks that the housing committee would accept the tenant as a tenant in the council house.

The relevant provision is section 3 of the Act of 1933, and in particular subsection (3); but I must first mention subsection (2), which provides that if the local authority for the area gives a certificate that it will provide suitable alternative accommodation available for the tenant, then that certificate is conclusive. That subsection does not apply in this case, because the flat in question is in the Thames Ditton area, and the local authority for that area have no house available. The council house which is offered is in the Surbiton area, and a certificate of the authority for that area is not within the subsection. To establish that there is suitable alternative accommodation the landlord must, I think, bring the case within subsection (3) of section 3 of the Act. It provides: "Where no such certificate as aforesaid is "produced to the court, accommodation shall be deemed to be "suitable if it consists either—(*a*) of a dwelling-house to which "the principal Acts apply; or (*b*) of premises to be let as a "separate dwelling on terms which will, in the opinion of the "court, afford to the tenant security of tenure reasonably equiva-"lent to the security afforded by the principal Acts in the case "of a dwelling-house to which those Acts apply, and is, in the "opinion of the court, reasonably suitable to the needs of the "tenant and his family as regards proximity to place of work," and there follow provisions about rent.

The council house which the landlord offers fulfils all the requirements of subsection (3) except in regard to security of tenure. It fails on that point. On the letting of a council house by a local authority to an individual there is no security of tenure. The terms of letting do not provide for any security at all. It is an ordinary weekly tenancy, and the council can evict the tenant at a week's notice if they please. In practice the local authority do not take such a stringent course except in the case of a tenant who does not pay his rent or does not behave properly.

Nevertheless, the terms of the tenancy do not give security. They enable the local authority to evict the tenant at a week's notice. This means that the requirements of the subsection are not satisfied. We cannot read the words "on terms" as if they meant "in circumstances." We have no right to put words into the Act or alter what is there. It appears to me that except when a housing authority in the same area gives a certificate within the terms of subsection (2), then a council house is not suitable alternative accommodation, because it does not by its terms afford reasonable security of tenure. For these reasons I think that the appeal should be allowed.

HODSON L.J. I agree.

MORRIS L.J. I agree.

*Appeal allowed.*

Solicitors: *Wilkinson, Howlett & Moorhouse; Bower, Cotton & Bower for Sherwood, Cobbing & Williams, Kingston-on-Thames.*

F. R. D.

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## STANTON IRONWORKS CO. LTD. *v.* SKIPPER.

1955
*Oct.* 27.

**Lord Goddard C.J., Ormerod and Barry JJ.**

*Factory — Criminal liability — Breach of regulation — Person not employed by factory occupiers killed as a result of a breach—Whether factory occupiers' liability to a penalty—Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connexion with Premises under the Factory and Workshop Act,* 1901 (*S.R. & O.*, 1906, *No.* 679), *reg.* 14—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 133.

*Factory—Persons benefited by regulations.*

The appellants, occupiers of a factory, sold slag to merchants for removal from their factory by the merchants. A locomotive shunting wagons on the appellants' premises collided with a lorry driven by a man employed by one of the merchants, and he fell out and was killed. The regulations (S.R. & O., 1906, No. 679) for use of locomotives and wagons made under the Factory and Workshop Act, 1901, applied to the appellants' premises. The appellants were charged under section 133 of the Factories Act, 1937, which provided: "If any person is killed . . . in consequence "of the occupier . . . of a factory having contravened any provision "of this Act or of any regulation" they should be liable to a fine, on the ground that there had been a breach of regulation 14 of the above regulations and as a consequence the deceased was killed.

The justices found that the locomotive was pushing more than one wagon whereby risk of injury might be caused to persons employed on the premises; that no one was accompanying or preceding the front wagon and no other efficient means were taken to obviate risk of injury to persons employed; that accordingly there was a breach of regulation 14, and therefore the appellants were guilty of an offence under section 133. On appeal against conviction:—

*Held*, assuming that the regulations were passed only for the benefit of the employees of factory occupiers, and therefore that the appellants did not owe a duty under regulation 14 towards a person who was not employed by them, that nevertheless, since there had been a breach of regulation 14, as a result of which a person, whether an employee or not, had been killed, the appellants were liable to a penalty under section 133 of the Act of 1937.

*Quaere.* Whether the appellants owed a duty under the regulations to persons other than their employees.

*Hartley* v. *Mayoh & Co.* [1954] 1 Q.B. 383; [1954] 1 All E.R. 375 considered.

CASE STATED by Leicester justices sitting at Melton Mowbray.

The appellants, Stanton Ironworks Co. Ltd., were charged on an information preferred by the respondent, James Theodore Skipper, that they on February 4, 1955, being the occupiers of a certain factory within the meaning of the Factories Act, 1937, to which regulations for use of locomotives and wagons made under the Factory and Workshop Act, 1901, applied, contravened regulation 14[1] in that, where a locomotive pushed more than one wagon and risk of injury was thereby caused to persons employed, a man did not accompany or precede the front wagon, or other efficient means were not taken to obviate such risks in consequence of which, Alfred Irael Clarence Smith was killed, whereby they, the occupiers, were liable to a fine not exceeding £100 as provided by section 133 of the Factories Act, 1937.[2]

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[1] Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connexion with Premises under the Factory and Workshop Act, 1901 (S.R. & O., 1906, No. 679), reg. 14: "Where a loco-"motive pushes more than one "wagon, and risk of injury may "thereby be caused to persons "employed, a man shall, wherever it "is safe and reasonably practicable, "accompany or precede the front "wagon or other efficient means "shall be taken to obviate such "risk."

[2] Factories Act, 1937, s. 133: "If "any person is killed, or dies, or "suffers any bodily injury, in con-"sequence of the occupier or owner "of a factory having contravened "any provision of this Act or of "any regulation or order made there-"under, the occupier or owner of the "factory shall . . . be liable to a "fine not exceeding £100."

1955

STANTON IRONWORKS CO. LTD. v. SKIPPER.

The justices found the following facts. The factory in question was occupied by the appellants and was subject to the regulations for use of locomotives and wagons made under the Factory and Workshop Act, 1901. On February 4, 1955, a locomotive was in use on the factory premises and was pushing more than one wagon whereby risk of injury might be caused to persons employed thereon. A man did not accompany or precede the front wagon, nor was it reasonably practicable for someone to do so, and other efficient means were not taken to obviate risk of injury to persons employed.

Smith was on the factory premises employed in carrying out work which was part of the work commonly carried out on the premises, namely, the removal of slag from the factory. There was no contract of employment between the appellants and Smith. The appellants in the course of their business sold slag to merchants for removal from the factory by the merchants and Smith was acting as a lorry driver in the employment of one of such merchants. Smith was killed in consequence of the appellants having contravened regulation 14. He was collecting slag, and for that purpose had to drive his lorry across various railway tracks, including that on which slag was being shunted up to a slag crusher. Having driven across this track he had to reverse his lorry backwards to bring it to the navvy where it would be loaded with slag. Near the point where the road crossed the tracks were notice boards stating "Danger beware of wagons." The engine driver, shunting wagons up to the slag crusher, did not see Smith or his lorry, but, having whistled, proceeded to shunt up the track. The wagons which the engine was pushing collided with the lorry, and Smith fell out of the lorry in front of the wagons and was killed. The wagons were being shunted to the crusher and travelling faster than a man could run. Just before the accident the lorry was seen by an employee of the appellants, who gave a shout of warning, but Smith did not hear it. There was a good deal of noise going on. There was nobody in control at the crossing. The engine driver was assisted by a shunter, among whose jobs was the running of the empty wagons from a crusher into a slip siding. After the empty wagons had been run into the siding, the engine driver would whistle and start pushing the loaded wagons up to the crusher. While that was being done it was necessary for the shunter to be ready to work the points near the top of the slope, in case the engine should stall. Those points were some distance from the place where the road crossed the track. The shunter could not always be watching the engine and the engine driver could not see anything directly in front of him.

It was contended by the appellants that it was not reasonably practicable for a man to accompany or precede the front wagon, but that other efficient means were taken to obviate risk of injury to persons employed, namely, the blowing of the locomotive whistle and the stationing of a man on higher ground near the destination of the locomotive and wagons where other persons employed by the appellants were working; that there was no contract of employment between the appellants and Smith, who was acting in the employment of one of the merchants to whom the appellants sold slag; that there was no risk of injury to any persons employed by the appellants; that Smith was not a person for whose benefit the regulations were made; that Smith's death was not caused directly by the contravention (if any) of the regulations; that Smith's death occurred at or near a level crossing, and that an efficient sound signal was given to persons employed; and that, accordingly, the appellants should not be convicted.

It was contended by the respondent that a man did not accompany or precede the front wagon; that other efficient means were not taken to obviate risk of injury to persons employed; that the work on which the deceased was employed was of a nature which normally would be carried on in the factory and that persons carrying out such work would be in the class of persons who would be in the contemplation of the Minister making the regulations; that at the time of the accident an engine was pushing two wagons whereby risk of injury might and was in fact caused to persons employed on the premises; that Smith was killed in consequence of the failure by the appellants to comply with the regulations.

The justices were referred to *Hartley* v. *Mayoh & Co.*[3] and *Vyner* v. *Waldenberg Bros. Ltd.*[4]

The justices were of the opinion that the work on which the deceased was employed was of a nature which normally would be carried on in the factory, and that persons carrying out such work would be in the class of persons who would be in the contemplation of the Minister making the regulations; that as it was proved that the movement of the locomotive pushing two wagons might and did, in the absence of efficient means to obviate risk, create a risk to persons employed, there was a breach of regulation 14 by the appellants; that Smith was killed in consequence of that breach, and was a person within the meaning of section 133 of the Factories Act, 1937, and that the appellants were liable to conviction under that section.

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[3] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

[4] [1946] K.B. 50; 61 T.L.R. 545; [1945] 2 All E.R. 547.

*M. V. Argyle* for the appellants. Regulation 14 is limited in its protection to the appellants' employees: *Hartley* v. *Mayoh & Co.*,[5] where it was held that a widow did not have a cause of action for breach of similar regulations dealing with electricity because her husband was not an employee of the factory owners. It is difficult to find any distinction between this case and *Hartley's* case,[5] and if Mrs. Smith were to claim damages in respect of her husband's death for breach of statutory duty against the appellants she would not, by reason of *Hartley's* case,[5] have a cause of action. Admittedly, the opening words of section 133 of the Factories Act, 1937, "If any person is killed," are wide words, but this section is drafted so as to apply to many other cases under the Factories Act where the breaches of statutory duty have a wider application than regulation 14. Section 133, being a penalty section for the whole of the Act of 1937, does not widen the scope of regulation 14.

*S. B. R. Cooke*, for the respondent, was not called upon.

LORD GODDARD C.J. The facts show that there is a railway with locomotives in the Stanton Ironworks. A locomotive was pushing wagons and a man was not walking in front of the wagons as a guard. The justices found that other efficient means were not taken to obviate risk to persons employed.

[His Lordship read regulation 14, and continued:] No doubt that regulation was passed for the benefit of the servants of the company, and in accordance with *Hartley* v. *Mayoh & Co.*,[1] I am assuming that the company do not owe a duty under that regulation towards a person who is not employed by them; but the regulation is broken if the company have not taken efficient means to guard against danger to their employees although no employee is injured at all. If one finds an engine pushing, not pulling, a wagon, and efficient means have not been taken to guard against the danger which must exist under those circumstances, that is a breach of the regulation. Then one turns to section 133 of the

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[5] [1954] 1 Q.B. 383.

[1] [1954] 1 Q.B. 383; [1954] 1 All E.R. 375.

Act, which provides: "If any person is killed, or dies, or "suffers any bodily injury, in consequence of the occupier or "owner of a factory having contravened any provision of this "Act or of any regulation" the occupier or owner is liable to a penalty not exceeding £100.

The justices found that the person was killed because the regulation was contravened. The regulation, as I have already pointed out, may be contravened although nobody is injured. Once the regulation is contravened and somebody is injured, the company is liable to a fine of £100. It may be, following *Hartley* v. *Mayoh & Co.*,[2] that the widow may not have an action for breach of the statutory duty, but it does not follow that an offence is not committed against section 133, because it says that if any person is killed through breach of the regulation then the occupier is liable. I think the justices came to a perfectly right decision and this appeal fails.

ORMEROD J. I agree. This appeal has been argued very largely on the question whether the man who was killed could be a person employed within the meaning of that term as used in regulation 14. Indeed, the justices, in coming to their decision, appear to have taken the view that this man did come within the scope of the regulations, because one of the findings in the case is that "The work upon which the deceased was employed "was of a nature which normally would be carried on in the "factory, and that persons carrying out such work would be in "the class of persons who would be in the contemplation of the "Minister making the regulations . . ." I think it is clear from *Hartley* v. *Mayoh & Co.*,[3] which was the case of a fireman who was electrocuted when he went on the premises to put out a fire, that the only persons in contemplation in the regulation are the persons actually employed by the occupier of the factory. Therefore, the question to be decided by the justices, in the first place, was whether under these particular conditions there was a risk of injury to persons employed by the occupiers of the factory, and whether, if there was that risk, such efficient means had been taken for their safety as to obviate such risk. Independently altogether of the question whether the justices thought that the man who was killed came within the words of the regulation, the justices have found that there was a risk of injury to persons employed, and that efficient means had not been taken to obviate it. In those circumstances, there is clearly a breach, whatever the consequence, of the regulation. In fact the injury which occurred was not an injury to a person employed by the occupiers, but to a person employed by an outside contractor. That does not render the appellants any less liable for a breach of the regulation, but it has the effect of bringing into play section 133 of the Factories Act, which governs the penalties which may be inflicted if any person is killed or dies or suffers bodily injury by reason of a breach of the regulation. For these reasons, I agree that the justices came to a proper decision and the appeal should be dismissed.

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[2] [1954] 1 Q.B. 383.

[3] Ibid.

BARRY J. I agree for the reasons given by my Lords. I am not entirely satisfied that the regulation under which this information was laid necessarily falls within the decision of *Hartley* v. *Mayoh & Co.*,[4] or is necessarily to be considered in a similar way to the electricity regulations, which were the regulations in question in *Hartley's* case.[4] However, as my brethren pointed out, that point is immaterial in the present case, and I am satisfied that the justices rightly convicted and that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Carpenters for G. Keogh & Co., Nottingham; The Solicitor, Ministry of Labour and National Service.*

C. J. E.

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[4] [1954] 1 Q.B. 383.

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## *In re* TRUMAN, HANBURY, BUXTON & CO. LTD.'S APPLICATION.

C. A.

1955
*Oct.* 27, 28.

Evershed M.R.,
Birkett and
Romer L.JJ.

*Restrictive Covenant—Obsolete—Modification—Meaning of "obsolete"—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1) (*a*).

In 1898, land at Leigh-on-Sea was laid out in plots as a building estate, it being then intended that the whole estate should be residential. The plots were sold subject to a restrictive covenant that the "trade of a hotel keeper, innkeeper, victualler of wines, "spirits or beer is not to be carried on upon the said land." A

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1955

TRUMAN, HANBURY, BUXTON & CO. LTD.'S APPLICATION, *In re.*

large number of residential houses had been erected fronting on a number of roads on the estate, one of the roads being the London Road. Fronting on this road shops had been erected and some residential premises had been converted into shops. The applicant company, a firm of brewers, had purchased two plots fronting London Road and applied under section 84 of the Law of Property Act, 1925, to have the restrictive covenant modified so as to permit the erection of a public house, contending that the changes consequent on the erection of shops rendered the covenant obsolete so far as the London Road frontage of the estate was concerned. The application was opposed by a number of owners of premises on the estate. The Lands Tribunal held that, although there was a change in the character of the area, that did not render the covenant in relation to licensed premises "obsolete" within section 84 (1) (*a*); and, further, that objectors entitled to the benefit of the covenant would be seriously injured if it were discharged or modified; and accordingly dismissed the application:—

*Held*, that, if the character of an estate as a whole or of a particular part of it gradually changed, a time might come when the purpose for which such covenant was imposed could no longer be achieved, for what was intended to be a residential area would have become substantially a commercial area, and when that time came it might be said that the covenant had become "obsolete" within the meaning of section 84 (1) (*a*) of the Act of 1925; but that the finding of the tribunal, that the desired discharge of the covenant would severely injure persons entitled to enforce it, made it impossible to say that this covenant had become "obsolete" within that provision.

Observations of Farwell J. in *Chatsworth Estates Co.* v. *Fewell* [1931] 1 Ch. 224, 229 and in *In re Henderson's Conveyance* [1940] Ch. 835, 846; 56 T.L.R. 952; [1940] 4 All E.R. 1 considered.

Decision of the Lands Tribunal affirmed.

APPEAL by case stated from a decision of Erskine Simes Q.C. sitting as the Lands Tribunal.

The case stated read as follows: "1. This was an application "under section 84 (1) of the Law of Property Act, 1925, by "Truman, Hanbury, Buxton & Co. Ltd. (hereinafter called 'the "'applicants') for an order discharging wholly a restriction "affecting two plots of land fronting to the London Road, "Leigh-on-Sea, imposed by a conveyance dated August 18, 1898, "and made between Alexander Underwood Higgins and William "Harvey.

"2. The said restriction provides that 'The trade of a hotel "'keeper, innkeeper, victualler of wines, spirits or beer, is not "'to be carried on upon the said land.'"

"3. The grounds of the application were that the application

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1955

TRUMAN, HANBURY, BUXTON & CO. LTD.'S APPLICATION, *In re.*

"fell within paragraphs (*a*) (*b*) and (*c*) of section 84 (1) of the "Law of Property Act, 1925.[1] . . .

"5. Twenty-one notices of objection to the application were "received. Two were withdrawn prior to the hearing and at the "hearing nine objectors appeared or were represented. . . .

"7. I heard the application on November 8, 1954, and on "November 22, 1954, I viewed the land the subject of the "application and the surrounding properties.

"8. At the hearing before me the following facts were proved "or admitted:—(a) The land the subject of this application "forms part of a large area of land known as the Leigh Park "Building Estate which was laid down in plots as a building "estate in or about 1898. . . . (b) The covenants as framed "applying to the plots indicate that it was intended that the "whole estate should be residential. (c) Development did not "take place generally upon the estate until 1925. (d) When "such development did take place a number of shops were "erected fronting to a portion of the London Road, and some "houses which had previously been erected fronting thereto have "been converted into shops. (e) On April 1, 1925, the restriction on the use of premises at the corner of Park Road and "London Road for licensed premises was released so far as it "could legally be so released by the successors in title of Mr. "Higgins so as to permit its use for off-licensed premises, and "it is now so used. (f) The houses in Gordon Road were erected

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[1] Law of Property Act, 1925, s. 84 (1): "The authority . . . shall ". . . have power from time to time, "on the application of any person "interested in any freehold land "affected by any restriction arising "under covenant or otherwise as to "the user thereof or the building "thereon, by order wholly or partially "to discharge or modify any such "restriction (subject or not to the "payment by the applicant of compensation to any person suffering "loss in consequence of the order) on "being satisfied—(*a*) that by reason "of changes in the character of the "property or the neighbourhood or "other circumstances of the case "which the authority may deem "material, the restriction ought to be "deemed obsolete, or that the continued existence thereof would impede the reasonable user of the "land for public or private purposes "without securing practical benefits "to other persons, or, as the case "may be, would unless modified so "impede such user; or (*b*) that the "persons of full age and capacity "for the time being or from time to "time entitled to the benefit of the "restriction, whether in respect of "estates in fee simple or any lesser "estates or interests in the property "to which the benefit of the restriction is annexed, have agreed, either "expressly or by implication, by their "acts or omissions, to the same being "discharged or modified; or (*c*) that "the proposed discharge or modification will not injure the persons "entitled to the benefit of the "restriction."

"after the events referred to in paragraphs (d) and (e). (g) The "gardens of four objectors, who own dwelling-houses in Gordon "Road (who were admitted to be entitled to the benefit of the "restrictions) adjoin the land, the subject of this application. "(*h*) The London Road was, until the construction of the new "arterial road, the main approach to Southend from London. "It still carries a heavy load of traffic and is particularly used "during the summer months and especially at week-ends by "visitors to Southend. (i) The user of on-licensed premises on "the land the subject of this application by such casual visitors "travelling by coach or motor-car to or from Southend would "have a detrimental effect upon the value of dwelling-houses in "Gordon Road, and would seriously interfere with the amenities "of those residents therein, whose gardens adjoin the land the "subject of this application. (j) Permission for the use of the "land for on-licensed premises was given by the Southend "County Borough Council under the Town and Country Planning "Act, 1947, on February 3, 1953. (k) A justices' full on-licence "was granted on April 12, 1954. (l) Plans and elevation of the "licensed house proposed . . . to be erected on the land, the "subject of this application, are annexed hereto and form part "of this case. (m) The applicants hope to attract to the proposed "licensed premises casual visitors travelling by motor-coach or "motor-car to and from Southend."

It was contended on behalf of the applicants: "(i) That the "changes consequent upon the erection of shops fronting to the "London Road rendered the covenant obsolete so far as the "London Road frontage of the estate was concerned. (ii) That "such changes as had taken place without any action to enforce "the covenants might be construed as an agreement by implica-"tion to the discharge of the covenant. (iii) That the discharge "of the covenant would not injure the persons entitled to the "benefit of the restrictions."

It was contended on behalf of the objectors: "(i) That the "erection of shops did not affect the validity or efficacy of the "restriction sought to be modified by the applicants. (ii) That "the objectors in Gordon Road had built their houses after shops "had been erected in London Road, but relying on the restric-"tion sought to be modified by the applicants. (iii) That the "erection of shops in breach of the covenants did not constitute "an agreement by implication to the discharge of the restriction, "the subject of this application. (iv) That the discharge or "modification of the restriction would injure the persons entitled "to the benefit of the restriction."

"11. I was referred to the following cases: *Chatsworth Estates* "*Co.* v. *Fewell*[2] and *In re Henderson's Conveyance*.[3] I was "satisfied that there is no doubt a change so far as London "Road is concerned, but I was not satisfied, applying the prin- "ciples laid down by Farwell J. in *Chatsworth Estates Co.* v. "*Fewell*,[4] that that change would justify me in saying that the "covenant in relation to licensed premises has been rendered "obsolete. I did not think that a failure to object to the erection "of shops or conversion of premises into shops on the London "Road, or the release of the restriction referred to in para- "graph 8 (*e*) of this case could be regarded as matters satisfying "me that section 84 (1) (*b*) of the Law of Property Act, 1925, is "satisfied in relation to this application. I was satisfied that the "objectors in Gordon Road who were admitted to be entitled to "the benefit of the restriction would be injured if the discharge "or modification of the covenant sought was granted, and I "therefore dismissed the application.

"It was not, therefore, necessary for me to deal in my "decision with the position which would have arisen had the "applicants satisfied me that either of the grounds set out in "paragraphs (*a*) or (*b*) of section 84 (1) was satisfied in relation "to this application. I construe section 84 (1) as giving to the "tribunal discretion whether or not to modify or discharge a "restrictive covenant if it is satisfied that any one of the "grounds set out in paragraph (*a*) (*b*) or (*c*) of that subsection "has been proved by an applicant. In the present case, "satisfied as I was that the discharge or modification of the "covenant so as to permit the erection of on-licensed premises "on the land would seriously injure persons admitted to be "entitled to the benefit of the covenant, I should, in the exercise "of the discretion to which I have referred, have refused the "application. The question for the opinion of the Court of "Appeal is whether I came to a correct decision in law."

The applicants appealed on the grounds that the tribunal was wrong in law—(1) In refusing to hold that the restrictions ought to be deemed obsolete, because the applicants had not shown that there had been so complete a change in the character of the neighbourhood that there was no longer any value left in the restrictions at all. (2) In construing section 84 (1) of the Law of Property Act, 1925, as giving to the tribunal a discretionary power to modify or discharge a restrictive covenant if it were satisfied that any one of the grounds set out in paragraphs (*a*), (*b*) or (*c*) of that subsection had been proved by an applicant. (3) In holding that, because persons entitled to the benefit of the restriction would be injured if the application were granted, it was not therefore necessary to consider whether either of the grounds set out in paragraphs (*a*) or (*b*) of section 84 (1) was satisfied in relation to the application.

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[2] [1931] 1 Ch. 224.

[3] [1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1.

[4] [1931] 1 Ch. 224.

*G. D. Squibb* for the applicants. The main question is what is meant in section 84 (1) (*a*) of the Law of Property Act, 1925, by the phrase "the restriction ought to be deemed obsolete." The tribunal applied the wrong test in deciding whether the restrictions in question are obsolete. For a restriction to be deemed obsolete it is not necessary for an applicant to prove that it is completely useless. The tribunal was wrong in applying the principles laid down by Farwell J. in *Chatsworth Estates Co.* v. *Fewell.*[5] That was not a case under section 84. The tribunal considered that if there was any value left in a covenant it could not be obsolete. That is the wrong test to apply on an application under section 84. It appears from the definition of "obsolete" in the Oxford English Dictionary that "obsolete" in this context means "out of date." Obsolete is not equivalent to "useless." It is clear that it is contemplated in section 84 that a covenant may be deemed obsolete, although it still has some value to some persons. *In re Henderson's Conveyance*[6] is an example of a covenant which was held not to be obsolete. The applicant having, it is submitted, satisfied the tribunal that the covenant is obsolete under the head (*a*) of subsection (1), the tribunal was wrong in considering head (*c*) and holding that, since its discharge would injure some persons, the tribunal had a discretion to refuse to modify the covenant. If an applicant satisfies the tribunal that a covenant is within head (*a*), (*b*) or (*c*) the tribunal must make an order modifying the restriction. Alternatively, if that contention is wrong, and the tribunal had a discretion in this case, it is submitted that having regard to the changes in the character of London Road its discretion was wrongly exercised.

[5] [1931] 1 Ch. 224, 229.

[6] [1940] Ch. 835; 55 T.L.R. 952; [1940] 4 All E.R. 1.

[*Macdougall* v. *Paterson*[7] and *Julius* v. *Lord Bishop of Oxford*[8] were referred to.]

*W. B. Harris* for G. A. Smith & Sons Ltd., an objector. The test laid down in the *Chatsworth* case[9] by Farwell J. is correct. "Obsolete" means "wholly or entirely out of date." The word in section 84 (1) (*a*) is not "obsolescent," which means "going "out of date," but "obsolete," which means that the covenant has become out of date. [*Attorney-General* v. *Blomfield*[10] was referred to.]

[He was stopped.]

*Geoffrey Rippon* for R. C. Percy-Smith and other objectors.

Evershed M.R. I will ask Romer L.J. to deliver the first judgment.

Romer L.J. This is an appeal by Truman, Hanbury, Buxton & Co. Ltd. against an order of Mr. Erskine Simes, who was sitting as the Lands Tribunal, in which he dismissed an application by the company, which was made under section 84 of the Law of Property Act, 1925, to have a certain restrictive covenant on property at Leigh-on-Sea in Essex discharged. The application was opposed by people living in the district, and they, or some of them, are represented before us on this appeal.

The land in question consists of two plots fronting on to a road called London Road, which, as I understand, was formerly the principal road between Leigh-on-Sea and London prior to the making of the arterial road which now exists. Those plots formed part of quite a considerable estate called the Leigh Park Building Estate. That estate was laid out for building purposes in 1898 and covers a considerable area, as is shown by a plan which forms part of the case, and to which we were referred. Large numbers of houses were built upon this property, and there are a number of roads on the property in addition to London Road itself; in particular, there is a road called Gordon Road, which runs into London Road, and in which some of the opponents to the application live.

As I understand it, the covenants which were imposed on these properties, when they were sold, were all in much the same form, and were directed to preserving the estate as a residential area. The particular covenant, which the company is seeking to get rid of, because they want to build a public-house or inn, is a covenant restraining the use of these plots for the trade of a hotel keeper, innkeeper, victualler of wines, spirits or beer. That covenant, unless modified or discharged, would obviously place a fatal bar between the company and the object which it desires to achieve.

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[7] (1851) 11 C.B. 755.

[8] (1880) 5 App.Cas. 214.

[9] [1931] 1 Ch. 224, 229.

[10] (1913) 33 N.Z.L.R. 545, 568.

[His Lordship read section 84 (1) of the Law of Property Act, 1925, and continued:] The facts which the arbitrator found to be either proved or admitted are set out in paragraph 8 of the case, and, so far as material, are as follows: After stating that the land the subject of this application formed part of a large area of land known as the Leigh Park Building Estate, which was laid out in plots as a building estate in 1898, he says: "The covenants as "framed applying to the plots indicate that it was intended that "the whole estate should be residential. Development did not "take place generally upon the estate until 1925. When such "development did take place a number of shops were erected "fronting to a portion of the London Road, and some houses "which had previously been erected fronting thereto have been "converted into shops. On April 1, 1925, the restriction on the "use of premises at the corner of Park Road and London Road "for licensed premises was released so far as it could legally be "so released by the successors in title of Mr. Higgins"—Mr. Higgins being the original vendor—"so as to permit of its use "for off-licensed premises, and it is now so used." Then: "The "gardens of four objectors who own dwelling-houses in Gordon "Road (who were admitted to be entitled to the benefit of the "restrictions) adjoin the land, the subject of this application. "The London Road was, until the construction of the new "arterial road, the main approach to Southend from London. "It still carries a heavy load of traffic and is particularly used "during the summer months and especially at week-ends by "visitors to Southend. The user of on-licensed premises on the "land the subject of this application by such casual visitors "travelling by coach or motor-car to or from Southend would "have a detrimental effect upon the value of dwelling-houses in "Gordon Road, and would seriously interfere with the amenities "of those residents therein whose gardens adjoin the land the "subject of this application." Permission for the use of the land for on-licensed premises has been given and a justices' full on-licence granted. Then finally: "The applicants hope to "attract to the proposed licensed premises casual visitors travel-"ling by coach or motor-car to and from Southend."

On those facts he made certain findings, which appear in paragraph 12. Amongst such findings Mr. Erskine Simes says this: "I was satisfied that there is no doubt a change so far as "London Road is concerned, but I was not satisfied, applying "the principles laid down by Farwell J. in *Chatsworth Estates* "*Co.* v. *Fewell*,[1] that the change would justify me in saying "that the covenant in relation to licensed premises has been "rendered obsolete." Then: "I was satisfied that the objectors "in Gordon Road, who were admitted to be entitled to the benefit "of the restriction, would be injured if the discharge or modification of the covenant sought was granted, and I therefore "dismissed the application." Then: "In the present case, "satisfied as I was that the discharge or modification of the "covenant so as to permit the erection of on-licensed premises "on the land would seriously injure persons admitted to be "entitled to the benefit of the covenant, I should, in the exercise "of the discretion to which I have referred, have refused the "application."

The particular ground upon which the application was made, and upon which it is now still sought to support it, is that the covenant in question ought to be deemed obsolete within the meaning of subsection (1) (*a*) of section 84, having regard to the changes which have taken place in the character of the property or the neighbourhood since 1898. The main attack which Mr. Squibb has levelled against the tribunal's decision is founded upon his reference to the principles laid down by Farwell J. in *Chatsworth Estates Co.* v. *Fewell*,[1] and which Mr. Erskine Simes said that he was applying. Mr. Squibb said, and rightly said, that the *Chatsworth Estates* case [1] was not a case under section 84 at all, and Mr. Squibb submits that the principles which were there laid down by Farwell J. are not applicable to cases under section 84.

In that case, which was brought by the trustees of the well-known Chatsworth Estates at Eastbourne, the plaintiffs were seeking to enforce certain restrictive covenants which were being infringed by the owner of one of the houses. It appears from the report that the defendant had suggested that the covenants could be modified under section 84 of the Law of Property Act, 1925, and the plaintiffs gave him an opportunity of making such an application, but, as he did not take it, and went on breaking the covenants, or so they alleged, they sued him for an injunction. One of the defences that he raised was that he was no

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[1] [1931] 1 Ch. 224, 229.

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longer bound by the covenants, because there had been a general change in the character of the neighbourhood. Farwell J. dealt with that. After saying that the estate as a whole, taking it broadly, still retained its character of being a residential area, he said [2]: "The defendant's first ground of defence is that there "has been such a complete change in the character of the "neighbourhood, apart from the plaintiffs' acts or omissions, "that the covenants are now unenforceable. But to succeed on "that ground the defendant must show that there has been so "complete a change in the character of the neighbourhood that "there is no longer any value left in the covenants at all. A "man who has covenants for the protection of his property "cannot be deprived of his rights thereunder merely by the acts "or omissions of other persons unless those acts or omissions "bring about such a state of affairs as to render the covenants "valueless, so that an action to enforce them would be un-"meritorious, not bona fide at all, and merely brought for some "ulterior purposes. It is quite impossible here to say that "there has been so complete a change in the character of this "neighbourhood as to render the covenants valueless to the "plaintiffs. Whether right or wrong the plaintiffs are bringing "this action bona fide to protect their property, and it is "hopeless to say that the change in the character of the "neighbourhood is so complete that it would be useless for me "to give them any relief."

As a supplement, as it were, to that case, one might refer to another decision of Farwell J., *In re Henderson's Conveyance*,[3] to which the tribunal was referred. That, in fact, was an appeal from an arbitrator's award under section 84. The judge said [4]: "Speaking for myself, I do not view this section of the "Act as designed to enable a person to expropriate the private "rights of another purely for his own profit. I am not suggesting "that there may not be cases where it would be right to remove "or modify a restriction against the will of the person who has "the benefit of that restriction, either with or without compensa-"tion, in a case where it seems necessary to do so because it "prevents in some way the proper development of the neigh-"bouring property, or for some such reason of that kind; but "in my judgment this section of the Act was not designed, at "any rate prima facie, to enable one owner to get a benefit by

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[2] [1931] 1 Ch. 224, 229.

[3] [1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1.

[4] [1940] Ch. 835, 846.

" being freed from the restrictions imposed upon his property in " favour of a neighbouring owner, merely because, in view of " the person who desires the restriction to go, it would make " his property more enjoyable or more convenient for his own " private purposes. I do not think the section was designed with " a view to benefiting one private individual at the expense of " another private individual. At any rate, primarily, that was " not, in my judgment, the object of this section. If a case is to " be made out under this section, there must be some proper " evidence that the restriction is no longer necessary for any " reasonable purpose of the person who is enjoying the benefit " of it, or that by reason of a change in the character of the " property or the neighbourhood, the restriction is one which is " no longer to be enforceable or has become of no value."

Mr. Squibb says that the tribunal in the present case was applying to section 84 the principle which Farwell J. had applied in the *Chatsworth Estates Co.* case,[5] and that principle, in effect, was that " obsolete " means " valueless." Mr. Squibb contends that the tribunal, accordingly, applied the wrong test of what is obsolete, namely, whether the covenant had become wholly valueless. He says that that test or question is relevant if a case is brought under subsection (1) (*c*), but not in relation to deeming a covenant to be obsolete within subsection (1) (*a*); that the tribunal, accordingly, may well have made the wrong approach to the relevant evidence, and, indeed, that there might have been further evidence on certain matters, if he had not made that approach to the circumstances of the case; and the case should be remitted to him with a proper direction as to what " obsolete " in section 84 (1) (*a*) really means. Indeed, this case really turns on the meaning of the word " obsolete " as used in section 84 (1) (*a*).

Mr. Squibb referred us to the New Oxford Dictionary, and, out of the many meanings which are to be found there, he selected, as being appropriate to this case, such definitions as " fallen into disuse," or " out of date," and said that was the proper interpretation to apply to " obsolete " in section 84, and that such an interpretation is quite distinct from the interpretation which he says the arbitrator inferentially put upon it, namely, valueless.

It seems to me that the meaning of the term " obsolete " may very well vary according to the subject-matter to which it is applied. Many things have some value, even though they are out of date in kind or in form—for example, motor-cars or bicycles, or things of that kind—but here we are concerned with its application to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case here of this estate in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them.

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[5] [1931] 1 Ch. 224, 229.

It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word " obsolete " is used in section 84 (1) (*a*).

If the arbitrator did, in fact, ask himself whether the covenant had become absolutely valueless, it may be that he was applying rather too strict a test, but I doubt whether this criticism which was made is not in reality directed rather to the form of the matter than to the substance, for, if the original object of the covenant can no longer be achieved, it is difficult to see how the covenant can be of value to anyone.

Be that as it may, I am quite satisfied that nothing would be gained by remitting the case to the tribunal. Mr. Erskine Simes saw the property, he heard the objectors and the evidence which was laid before him upon the matter as a whole, and he came to the conclusion that the discharge or modification of the covenant, so as to permit the erection of on-licensed premises on the land, would seriously injure persons admitted to be entitled to the benefits of the covenant; not one or two people, be it noted, but persons in general.

If serious injury would result to the opponents and others if the covenant was discharged (and having regard to the proposed user for the benefit of motor-coach travellers between Southend and London, it is very easy to imagine the kind of result that would happen), I cannot see how, on any view, the covenant can be described as obsolete, because the object of the covenant is still capable of fulfilment, and the covenant still affords a real protection to those who are entitled to enforce it.

As I say, I think that the finding that the discharge, which the company are asking for, would seriously injure these persons, renders it almost impossible in itself to say that the covenant has become obsolete in the light of the interpretation which I have given to the word "obsolete," and which I believe to be the right one having regard to its context; and, accordingly, for my part, I cannot accept the submission which Mr. Squibb has made upon that issue, which was the main issue in the appeal.

Mr. Squibb, on the footing that he was successful on the main issue, raised certain further objections to the decision of the tribunal. He said, in the first place, that the tribunal appeared to take the view that, even if the applicant brings himself fairly and squarely within some portion of section 84, nevertheless the tribunal has a discretion whether or not to make the order which the applicant is asking for. Mr. Squibb said, and he referred to certain cases on the subject, that once the tribunal finds that an applicant has made out his case within some limb of section 84, there is no question of discretion at all; he is entitled to an order as of right. The second point that Mr. Squibb made was that the arbitrator seemed to think that, even though an applicant brings himself, for example, within subsection (1) (*a*), it is still relevant to see whether he is also within subsection (1) (*c*). Mr. Squibb says that once a person has shown himself to be within subsection (1) (*a*), then the question as to whether he is also within another part of the section is wholly irrelevant.

Those questions do not arise, having regard to what I think is the right answer to the main question which has been discussed, and I prefer to express no opinion upon them, but, for the reasons which I have given, I would dismiss the appeal.

BIRKETT L.J. I am entirely of the same opinion and have nothing to add to the judgment which has just been delivered.

EVERSHED M.R. I also agree.

*Appeal dismissed.*

Solicitors: *Gibson & Weldon for H. Maxwell Lewis, Southend-on-Sea; J. P. Nolan & Janes, Southend-on-Sea; Bates, Son & Braby, Southend-on-Sea.*

B. A. B.

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*Oct.* 21, 24.

Denning,
Hodson and
Morris L.JJ.

## WHEELER *v.* MERCER.

[Plaint No. L. 116.]

*Landlord and Tenant—Act of* 1954—*Security of tenure—Tenancy at will —Tenant holding over in* 1953 *pending conclusion of negotiations for new lease—Demand for possession by landlord in* 1955—*Holding over during negotiations held a tenancy at will—Tenancy at will of business premises protected by Act—Landlord required to terminate tenancy in accordance with statutory provisions—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23, 24, 25 (1) (2) (3) (4), 43, 69.

*Landlord and Tenant — Tenancy at will — Holding over — Pending negotiations for new lease—Purchaser in possession.*

A tenant of shop premises, whose quarterly tenancy had been terminated by notice to quit in September, 1953, and who had begun proceedings for a new lease or compensation under the Landlord and Tenant Act, 1927, prior to that date, held over pending the conclusion of negotiations. These continued inconclusively until in April, 1955, the landlord took out a summons for immediate possession in the county court:—

*Held,* (1) that the occupier was a tenant at will since she had held over with the landlord's consent pending the conclusion of negotiations for a new lease and was accordingly in occupation by virtue of an implied tenancy agreement.

*Leigh* v. *Dickeson* (1884) 15 Q.B.D. 60 distinguished.

(2) That a tenancy at will of business premises was within the protection of the Act of 1954, because it was "a tenancy "created . . . by a tenancy agreement" within the definition in section 69; and that, although subsections (3) and (4) of section 25 appeared to contemplate the termination of only such tenancies as at common law came to an end either by notice to quit or by effluxion of time and consequently to ignore tenancies at will terminable at common law on demand, those subsections were not sufficient to cut down the applicability of subsections (1) and (2) to tenancies at will; and that the landlord accordingly could terminate this tenancy at will only by notice in the prescribed form given not less than six months before the date specified in the notice.

*Per* Denning L.J. If a purchaser goes into possession under a treaty for purchase, and then the sale goes off, he is not a tenant at will. He is a licensee; see *Errington* v. *Errington and Woods* [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

APPEAL from Judge Glazebrook, sitting at Tunbridge Wells County Court.

In 1936 Miss Helen Molly Mercer, the defendant in the present action, became joint lessee with one Saunders of a shop in Grosvenor Road, Tunbridge Wells, where they carried on a business as confectioners and tobacconists, paying a rent of £52 a year. The lease came to an end in September, 1943, and Miss Mercer continued thereafter (as the county court judge found) as a quarterly tenant at a rent of £68 a year. That quarterly tenancy was terminated by the landlord, Alfred Morris Wheeler, by a notice to quit expiring on September 29, 1953.

In February, 1953, Miss Mercer had begun negotiations with the landlord for a new lease at a higher rent, and during the currency of the notice to quit, namely, on July 6, 1953, she gave notice under the Landlord and Tenant Act, 1927, claiming from the landlord a new lease or compensation. The proceedings were begun in the county court under that Act and the pleadings were delivered; but, before the hearing, negotiations for a settlement out of court began, and the case was accordingly adjourned.

The negotiations continued from October, 1953, without reaching any conclusion until, on April 6, 1955, the landlord's solicitors wrote asking Miss Mercer to vacate the premises immediately, and on April 13, 1955, he issued a summons for possession on the ground that the tenancy had been terminated by the notice to quit and that Miss Mercer had wrongfully remained in possession. By her defence she claimed that by reason of the agreement to adjourn the hearing of the claim for a new lease under the Act of 1927 pending negotiations, she had remained in occupation of the premises with the right to exclusive possession for the purposes of a business carried on by her; that it was impliedly agreed that she should remain in possession as a tenant until the negotiations were successfully concluded, or the proceedings were withdrawn, or dismissed, or successful, as the case might be; and that that tenancy had not been determined. Alternatively, she claimed that since September 30, 1953, she had been a tenant at will and that that tenancy at will had never been determined.

At the hearing in the county court the landlord alleged that Miss Mercer was from September 29, 1953, a mere licensee, or, alternatively, a tenant at sufferance, or at most a tenant at will. For Miss Mercer it was contended that she must in the circumstances be deemed to have been either a yearly or a quarterly tenant; and if she was neither of those she was a tenant at will.

The county court judge on July 28, 1955, held that when the notice to quit expired, Miss Mercer had been a quarterly tenant. He added that it would clearly have been open to Miss Mercer to apply under section 5 (13) of the Landlord and Tenant Act, 1927, for an order authorizing her to continue in possession until after the termination of the proceedings. The point whether an application could be made after the expiration of the notice to quit was not clear and had never been decided; but in practice such applications were seldom made unless there was a threat to turn the tenant out of possession. The parties, he went on, had always had in mind the strong possibility of a lease being agreed between them out of court. It was recognized that Miss Mercer's possession, pending the settlement, was perfectly lawful. The judge held that after the expiry of the notice to quit she had been "a typical tenant at will, conforming to all the classical "definitions of such a tenant." She was not, in his view, a mere licensee, because she was in exclusive possession with the consent of the owner; nor was she a tenant at sufferance, because the landlord's positive assent must be implied from the circumstances.

The judge then considered the effect of the Landlord and Tenant Act, 1954[1] (which came into operation on October 1,

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[1] Landlord and Tenant Act, 1954, s. 23: "(1) Subject to the provisions "of this Act, this Part of this Act "applies to any tenancy where the "property comprised in the tenancy "is or includes premises which are "occupied by the tenant and are so "occupied for the purposes of a "business carried on by him or for "those and other purposes."

S. 24: "(1) A tenancy to which "this part of this Act applies shall "not come to an end unless termi"nated in accordance with the pro"visions of this Part of this "Act; . . ."

S. 25: "(1) The landlord may "terminate a tenancy to which this "Part of this Act applies by a notice "given to the tenant in the prescribed "form specifying the date at which "the tenancy is to come to an end "(hereinafter referred to as 'the "'date of termination'): . . . "(2) Subject to the provisions of the "next following subsection, a notice "under this section shall not have "effect unless it is given not more "than twelve nor less than six "months before the date of termina"tion specified therein. (3) In the "case of a tenancy which apart from "this Act could have been brought to "an end by notice to quit given by "the landlord—(a) the date of ter"mination specified in a notice under "this section shall not be earlier "than the earliest date on which "apart from this Part of this Act "the tenancy could have been "brought to an end by notice to quit "given by the landlord on the date "of the giving of the notice under "this section; and (b) where apart "from this Part of this Act more "than six months' notice to quit "would have been required to bring "the tenancy to an end, the last "foregoing subsection shall have "effect with the substitution for "twelve months of a period six "months longer than the length of "notice to quit which would have "been required as aforesaid. (4) In "the case of any other tenancy, a "notice under this section shall not "specify a date of termination earlier "than the date on which apart from "this Part of this Act the tenancy "would have come to an end by "effluxion of time."

S. 69: "(1) In this Act the "following expressions have the "meanings hereby assigned to them "respectively, that is to say:— ". . . 'notice to quit' means a "notice to terminate a tenancy "(whether a periodical tenancy or a

1954), on a tenancy at will, and whether the provisions of the Act gave such a tenant security of tenure. It seemed to him that, agreement being the essence of a tenancy at will, such an agreement was a "tenancy agreement" covered by the definition in section 69 of the Act of 1954. In his view, it could well be the policy of the legislature to protect such tenancies, which might be expressly created at a substantial rent where a tenant had been in occupation for many years, though the fact that a person was a tenant at will would be a matter to be taken into account when the length of the new lease was considered. It followed, the judge concluded, that since a tenancy to which section 23 of the Act of 1954 applied must be terminated by the special notice required by section 25 and that no such notice had been served on Miss Mercer, she was still a tenant at will. He accordingly dismissed the claim for possession.

The landlord appealed.

*Michael Parker* for the landlord. On the conduct of the parties as shown in the correspondence, the true status of this occupier after the notice to quit had expired was that of a licensee with no more than a permission to remain in the premises, albeit in exclusive occupation, and that the landlord had the right to evict her, subject to her rights, if any, under the Landlord and Tenant Act, 1927: see *per* Denning L.J. in *Errington* v. *Errington and Woods* [2] on the difference between tenancy and licence. There was here no intention to create the relationship of landlord and tenant; the occupier was not in occupation of necessity pending the grant of a new tenancy, nor as an applicant for a new lease under the Act of 1927, for she had not obtained an order for security of tenure and was therefore not fully protected until the claim for a new lease had been heard.

[DENNING L.J. But if the negotiations led her to think that she was in a secure position, would she not be equally protected?]

No; for this landlord's attitude was clearly one of growing irritation at the course of the negotiations, and at no time did he indicate that he had no intention of turning her out until agreement had been reached as to the future.

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"tenancy for a term of years certain) "given in accordance with the provisions (whether express or implied) "of that tenancy; . . . 'tenancy' "means a tenancy created either "immediately or derivatively out of "the freehold, whether by a lease or "underlease, by an agreement for a "lease or underlease or by a tenancy "agreement. . . ."

[2] [1952] 1 K.B. 290, 297; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

Secondly, if she was not a mere licensee, she was a tenant at sufferance, and as such, apart from her potential right to claim a new lease under the Act of 1927, she could be required to go at any time after the expiry of the notice. The only effect of the negotiations on her position was that she would have to be given a reasonable time in which to go: see Foa on General Law of Landlord and Tenant, 7th ed., p. 2, that a tenant who holds over without either the assent or dissent of his landlord is a tenant at sufferance. That is this case, for the landlord neither assented to nor dissented from her remaining; indeed, the fact that he took no rent may be evidence of dissent. See also Woodfall on Landlord and Tenant, 25th ed., p. 303, that the express or implied assent of the landlord is necessary to create a tenancy at will; and Hill and Redman on Law of Landlord and Tenant, 11th ed., pp. 18–21, to the same effect. In *Leigh* v. *Dickeson*[3] (which was not cited to the county court judge) a tenant who held over after the expiry of a lease was held to be a tenant at sufferance; and that is the position here. If she is a tenant at sufferance, this occupier cannot be within the protection of the Landlord and Tenant Act, 1954, for such a tenancy is not founded on agreement, either express or implied.

Thirdly, it is submitted that if, as the county court judge held, she has a tenancy at will, such a tenancy is not protected by the Act of 1954. The words "tenancy agreement" in the definition section (section 69), read in their context and in the light of the scheme of Part II of the Act, do not include an agreement the whole of which has to be implied. The scheme confers on landlords and tenants of shop premises certain rights and provides the only methods by which a tenancy within the protection of the Act can be terminated. The relevant provisions of the Act are unworkable if applied to a tenancy at will, which by its nature is of uncertain duration and terminable on demand. Section 25 in particular, which requires a landlord to terminate a tenancy protected by the Act by notice in the manner prescribed, is wholly inapplicable to tenancies at will, which are not determined by "notice" in the strict sense of the term; moreover, subsections (3) and (4) of that section, which contemplate only tenancies either terminated by notice to quit or which come to an end by effluxion of time, are clearly inapplicable to tenancies at will, which are terminated neither by notice to quit nor by effluxion of time; a fortiori when regard is had to the definition of "notice

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[3] (1884) 15 Q.B.D. 60.

"to quit" in section 69. The words "any other tenancy" in subsection (4) must be read in their context as applicable to a tenancy which comes to an end by effluxion of time, and are so limited.

If a tenancy at will is outside the definition in section 69 and the ambit of section 25, section 26 (1), under which a tenant is entitled to apply for an extension of "the current tenancy," is also unworkable in relation to a tenancy at will, for a tenant can only invoke the protection of this Part of the Act where he can seek a new tenancy for a term of years certain exceeding one year; section 29 (3) is similarly unworkable, for the court would have no jurisdiction to consider a tenancy at will; and the nature of such a tenancy would make it difficult for a court in the exercise of its discretion under section 33 to fix the duration of a new tenancy "for a term of years certain" to "begin on the coming "to an end of the current tenancy"; while section 34 would create further difficulty, for one cannot conceive of determining the rent payable on a tenancy at will by reference to a tenancy let "in the open market."

Finally, it would be astonishing if a tenancy at will were protected by this Act when, as the law stands at present, the type of relationship between landlord and tenant which is included in "tenancies at will" under the old cases covers cases where persons are let into a house pending completion of purchase: see *Howard* v. *Shaw*.[4] It cannot be right that this Act of 1954 provides that such a person could be held to occupy under a "tenancy agreement" within the definition in section 69 or to have the right to six months' notice once he had been let in.

*James Fox-Andrews* for the tenant. If the Act of 1927 had still been in force when these negotiations broke down, this occupier might have obtained from the court a term for a number of years certain under section 4 or a right under section 5 to claim compensation for goodwill after she had quitted the premises; but in view of the decisions in *Smith* v. *Metropolitan Properties Co. Ltd.*[5] and *Butlins Ltd.* v. *Fytche*[6] the claim for compensation could not be made until the tenant had quitted, though Somervell L.J. in *Butlin's* case[7] queried whether a claim for compensation in the alternative under section 5 might not be added to a claim for a new lease under section 4. That alternative claim was made by this tenant in her pleadings under the Act of 1927; but it

[4] (1841) 8 M. & W. 118.

[5] [1932] 1 K.B. 314; 48 T.L.R. 32.

[6] [1948] 1 All E.R. 737.

[7] Ibid. 740.

automatically came to an end on October 1, 1954, when the Act of 1954 came into force and by Schedule 7 repealed sections 4 to 7 of the Act of 1927. Thus, being still in occupation, she can now never get an order for compensation under section 5, and if she is not within the protection of the Act of 1954 she will have been deprived by its operation of accrued rights. Moreover, the Act, while protecting the claims of persons who had obtained an order for security of tenure before it came into force (9th Sch., para. 8), denied similar protection to persons who according to the usual county court practice were in as good a position as a person with an order. If, therefore, the Act of 1954 does not protect this tenant she will have been deprived of those rights which she had under the Act of 1927.

Secondly, the county court judge was right in finding that her holding over after September 29, 1953, stemmed from the landlord's assent, which could be spelled out of the correspondence passing between the parties before the notice to quit. Where a tenant holds over at the end of his lease, then, in the absence of any express agreement, he must either be a tenant at sufferance or a tenant at will; and where, as here, correspondence for a new lease began before the tenancy determined and continued after that date, the court should infer that the tenant remained in exclusive possession with the assent of the landlord as a tenant at will. *Leigh* v. *Dickeson*,[8] so far as the decision is relevant, is distinguishable; for though the tenant who held over was said to be a tenant at sufferance, the report of the case at first instance shows that the correspondence for a new lease began only after the lease had come to an end: see also Woodfall, 17th ed., p. 253, that if a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further lease "he is . . . a "tenant strictly at will." That passage, cited with apparent approval in *Morgan* v. *Harrison Ld.*,[9] has survived to the current edition (25th ed., p. 305). It is conceded that a tenancy at sufferance is not within the protection of the Act of 1954, since it cannot arise by contract (though compare *per* Astbury J. obiter in *Artizans, Labourers and General Dwellings Co.* v. *Whitaker*[10] that a tenant at sufferance who paid rent more than two-thirds of the rateable value might be a "tenant" within the Rent Act of 1919).

But it is submitted that this tenant was a tenant at will, and as such was within the protection of the Act of 1954. Most tenancies at will in modern times arise on a holding over and exist by virtue of a contract (as defined by Foa, 7th ed., p. 3), and are within the definition of "tenancy agreement" in section 69 of the Act of 1954. That definition covers the word "tenancy" wherever it occurs in the Act; a fortiori, since section 43, which expressly excludes certain tenancies from the protection of the Act, does not exclude a tenancy at will. The only provisions of the Act which create any difficulty in relation to a tenancy at will are subsections (3) and (4) of section 25, which, it is conceded, do not appear to contemplate such a tenancy; but that is the fault of the draftsman, and those subsections do not suffice to exclude such a tenancy from the other provisions of the Act. Even section 25, apart from subsection (3), is applicable to a tenancy at will; for subsection (1) requires no more than that a date of termination shall be stipulated in the notice of termination. At common law a tenancy at will can be terminated by demand; and under the Act a notice by the landlord in the form prescribed specifying a date six months hence as the date of termination would be equivalent to a notice of demand at common law. Moreover, the words at the beginning of subsection (4) "In the case of "any other tenancy" are wide enough to cover tenancies of any kind other than those dealt with in subsection (3) and therefore to include a tenancy at will.

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[8] (1883) 12 Q.B.D. 194.

[9] [1907] 2 Ch. 137, 140.

[10] [1919] 2 K.B. 301, 304; 35 T.L.R. 521.

If a tenancy at will of shop premises is protected by the Act, and it is accepted that the landlord must serve notice in the form prescribed specifying a date at least six months ahead, the other provisions of the Act become quite workable. The only hardship this landlord will suffer if the tenant gets a new lease is that he will lose the value of the goodwill which she has attracted to the premises; and that is the intention of the legislature, which is to protect small shopkeepers.

As to the suggestion that because of the old decisions that a man who entered into possession under negotiations for purchase was a tenant at will, therefore such a person would acquire under this Act an automatic right to at least six months' occupation, it is submitted that in modern times such an intending purchaser would not be held to be a tenant at will. The question now is one of intention: see *per* Denning L.J. in *Errington* v. *Errington and Woods*.[11] In most modern cases a tenancy at will arises only on a holding over at the end of some interest. The old decisions were based on the view that there was a conflict between a licensee and a tenant at will.

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[11] [1952] 1 K.B. 290, 297.

*Parker* replied.

Denning L.J. Miss Mercer has been a tenant of business premises in Tunbridge Wells since 1936. For a time she held under a lease, but in the later stages there was a quarterly tenancy. That tenancy was determined by a notice to quit which expired at Michaelmas, September 29, 1953. When she received the notice to quit she gave (as she was entitled to do at that time) a notice under the Landlord and Tenant Act, 1927, claiming a new lease on the ground that goodwill had become attached to the premises. There were proceedings in the county court on her claim for a new lease, but the case never came to hearing because in October, 1953, it was adjourned so as to enable the parties to negotiate.

Miss Mercer never applied for an order for security of tenure under the Act of 1927. The reason was that for all practical purposes she had security by the fact of lodging her claim. The landlord did not take out a summons for possession against her because he knew it would be countered by an application for security. It is common knowledge that that was the usual course in such cases. So Miss Mercer stayed on by mutual consent, pending determination of her claim for a new lease.

Negotiations then took place for some 18 months for a new lease. Just when it appeared that the parties might come to an agreement, the landlord changed his mind on the matter. By a letter of April 6, 1955, he demanded possession of the premises, and on April 13, 1955, he took out a summons for possession which came before the county court judge. By this time, however, Miss Mercer had no protection under the Landlord and Tenant Act, 1927, because the relevant provision of that Act had been repealed by the Landlord and Tenant Act, 1954; but she claims that she is entitled to protection under the Act of 1954.

The Act of 1954 gives an automatic extension to tenancies of business premises. The question is whether Miss Mercer can take advantage of it. This depends on whether in April, 1955, she was in occupation of the premises as a tenant under "a "tenancy agreement" within the meaning of the Act of 1954. The landlord says that she was not. He says that after September 29, 1953, when her quarterly tenancy expired, she held over only as a tenant at sufferance or a licensee, or at most, he says, a tenant at will; and as such he says that she is not within the protection conferred by the Act of 1954.

In my opinion Miss Mercer was not a tenant at sufferance; she held over with the landlord's consent, not without it, and as such she was prima facie a tenant at will. True it is that under recent cases she might be held to be a licensee if all that she had was a mere personal privilege, such as happens when the landlord allows a person to stay on as an act of humanity or as an act of grace or favour; but Miss Mercer had more than a personal privilege. She claimed to be entitled to a new lease and, if she made good her claim, she would be there by right. She asked no favours and received none. She was, I think, a tenant at will.

The question arises, therefore, whether a tenancy at will is within the Act of 1954. The definition section (section 69) provides: "'Tenancy' means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease, or by a tenancy agreement." That definition is wide enough to include a tenancy at will, because every tenancy at will is created by agreement, express or implied. But Mr. Parker says that there are other sections in the Act which show that a tenancy at will is not included. He points particularly to the provisions of section 25 which show, he says, that the only tenancies in contemplation under this part of the Act are tenancies which could be brought to an end by notice to quit, or tenancies which would come to an end by effluxion of time. He says that a tenancy at will is none of these things. It does not determine by notice to quit, but determines by demand, and certainly not by "notice to quit" such as is defined in section 69. It is not a tenancy which comes to an end by effluxion of time. It is, therefore, not in contemplation at all.

In considering this argument, it is necessary to remember the scheme of the Act. Tenancies of business premises are automatically extended beyond the common law time unless and until determined in the manner prescribed by the Act. They can be determined only by a notice of determination which is not less than six months' notice nor more than 12 months' notice. Such a notice must not be given for a time earlier than could be given at common law, or for a time earlier than that at which the common law lease would expire by effluxion of time; but it can be given to expire at any later time. The object of section 25 (3) and (4) is to make it clear that the notice must not be given earlier than the common law time. That is all.

There was no need to make any such provision about tenancies at will, which could at common law be determined on demand at any time. The omission of them is therefore intelligible in that place without taking them out of the Act altogether. I agree with Mr. Parker that the draftsman of the Act had not in mind tenancies at will when he was drafting subsections (3) and (4) of that section of the Act, but nevertheless I cannot find in those subsections anything sufficient to take tenancies at will out of the Act. In my opinion, therefore, this tenancy at will comes within the Act, and the landlord could not determine it except by a six months' notice of termination in accordance with the provisions of section 25 of the Act.

Mr. Parker then raised a point which he said would give rise to difficulty in the future. He took the case of a person who goes in under a treaty for purchase, and then the sale goes off. Such a person has been stated in the old books to be a tenant at will. Is he to be entitled to the benefit of the Act? I think not, for the simple reason that such a person is not a tenant at will at all. He is only a licensee: see *Errington* v. *Errington and Woods*.[1] In any case such a person does not hold under a "tenancy agreement" within the definition contained in section 69 of this Act.

My conclusion is that Miss Mercer holds under a tenancy agreement within the meaning of the Act. I may say that any other view would, I think, be unfortunate. It is quite plain from the transitional provisions of paragraph 8 of the Ninth Schedule to the Act of 1954 that if she had got an order for security of tenure under the Act of 1927 it would have been regarded as equal to a tenancy. Miss Mercer did not get such an order for security of tenure, but she had by the mutual consent of the parties something which was just as good. I should regard it as unfortunate if the agreement by mutual consent did not give her the same protection as an order for security would have done. This result is achieved by holding her to have a tenancy agreement within the meaning of this Act, and she is protected accordingly. I agree with the judgment of the county court judge, and I would dismiss this appeal.

HODSON L.J. I also agree with the county court judge on both points, and I would dismiss this appeal. The first question discussed was whether or not Miss Mercer was a tenant at will.

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[1] [1952] 1 K.B. 290, 297; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

I think that her position is that which is clearly covered by authority, namely, that of a tenant whose lease has expired, who has been permitted to continue in possession pending a treaty for a further lease, and as such she is a tenant at will. It is to be noticed that negotiations for the new tenancy began before the expiration of the old lease. I mention that because the careful research of Mr. Parker has brought to our notice *Leigh* v. *Dickeson*,[2] where in a similar case the tenant was held to be not a tenant at will but a tenant at sufferance. The only distinction which Mr. Fox-Andrews was able to find between that case and the present was that in that case the defendant had continued in possession for some time after the lease had expired, and it was not until later that a correspondence began between the solicitors of the plaintiffs and the defendant with a view to the continuation of the tenancy. I agree with my Lord that the line of authority to the effect which I first stated seems to lead to the inevitable conclusion that the county court judge was right in saying that Miss Mercer was a tenant at will and not a mere tenant at sufferance.

The second point—whether this tenancy at will is covered by the Landlord and Tenant Act, 1954—is a troublesome question of construction. But when one looks at the interpretation section in that Act (section 69) I think that the judge was clearly right in taking the view that "tenancy agreement" were apt words to cover a tenancy at will, which is essentially a tenancy by agreement. The difficulty arises when one considers the earlier sections of the Act. It is to be observed that section 43 does not exclude from Part II of this Act (the Part in question here) a tenancy at will. But an earlier section of the Act (particularly section 25) does present a difficulty which is strongly relied on by Mr. Parker for the appellant. Section 25 concerns termination of the tenancy by the landlord, and in subsection (2) provides: "Subject to the provisions of the next following subsection, a "notice under this section shall not have effect unless it is given "not more than twelve nor less than six months before the date "of termination specified therein." So far so good. But the following subsection, subsection (3), to which the earlier subsection is said to be subject, deals with tenancies which, apart from this Act, could have been brought to an end by notice to quit to be given by the landlord. Notice to quit is defined in section 69 (1) to mean: "a notice to terminate a tenancy

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[2] (1884) 15 Q.B.D. 60.

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"(whether a periodical tenancy or a tenancy for a term of years "certain) given in accordance with the provisions (whether "express or implied) of that tenancy." So that that subsection does not apply to a tenancy at will which is brought to an end by demand. Subsection (4) purports, I think, to provide a complete dichotomy and to deal with all other tenancies—that is to say, other than those which could have been brought to an end by notice to quit—because it reads as follows: "In the case "of any other tenancy, a notice under this section shall not "specify a date of termination earlier than the date on which "apart from this Part of this Act the tenancy would have come "to an end by effluxion of time."

It appears, therefore, that the draftsman of the Act had not in mind any other tenancies but tenancies which could, apart from the Act, be brought to an end by notice to quit, and tenancies which come to an end by effluxion of time. But if one reads the section, as one possibly can, so as to include tenancies at will in the words "any other tenancy," one is left in this position, that tenancies at will are left, so to speak, in the air. That seems to me to leave still open for operation subsection (2), which merely imposes a limit on notices to be given by landlords. The effect is that in such a case as this the notice shall not have effect unless it is given not more than 12 months nor less than six months before the date of termination specified therein, and means, therefore, that in a case which is not covered specifically by the other subsections of section 25 a six months' notice must be required.

I express no opinion on the question which my Lord has mentioned, whether the purchaser of a house who was let into occupation pending completion can be regarded as a tenant at will. Mr. Parker relied on that matter because he said that it showed how absurd it was to consider that tenants at will could be covered by this section. The cases which are collected together in Woodfall on Landlord and Tenant, 25th ed., at p. 305, are old cases which are cited in support of the proposition that a person who is admitted pending a treaty for purchase is a tenant at will, and it is not necessary to express any opinion—indeed, we have not considered those cases—whether that is the law at the present time. However that may be, and however wide may be the scope of the expression "tenant at will," it appears to me that the county court judge was right in saying that such a tenancy is covered by the Act of 1954, and the necessary consequences follow. I agree, therefore, that this appeal fails.

MORRIS L.J. I also agree. I have found myself in entire agreement with the conclusion of the county court judge that on the facts of this case Miss Mercer's position could properly be described as that of a tenant at will; and further, I think that her tenancy at will came within the definition of "tenancy" to be found in the Landlord and Tenant Act, 1954. That definition includes the words "a tenancy agreement." Therefore I think that Miss Mercer had a tenancy.

That being so, it becomes necessary to look at sections 23, 24 and 25 in order to see what follows. Section 23 (1) provides: "Subject to the provisions of this Act, this Part of this Act "applies to any tenancy where the property comprised in the "tenancy is or includes premises which are occupied by the "tenant and are so occupied for the purposes of a business carried "on by him or for those and other purposes." This tenancy was, therefore, a tenancy to which Part II of the Act applied.

Section 24 (1) provides: "A tenancy to which this Part of "this Act applies shall not come to an end unless terminated in "accordance with the provisions of this Part of this Act." There was here no such termination. It is said that section 25 (and in particular subsections (3) and (4)) introduce a limitation. The first subsection of section 25 is general and states: "The land-"lord may terminate a tenancy to which this Part of this Act "applies by a notice given to the tenant in the prescribed form" —that was not done in this case—"specifying the date at which "the tenancy is to come to an end," and that under the scheme of the Act is called "the date of termination." Then subsection (2) provides specifically that the notice is not to have effect "unless it is given not more than twelve nor less than six months "before the date of termination" specified in it.

It is necessary, in considering subsections (3) and (4), to see the definition of "notice to quit" in section 69: "'notice to "'quit' means a notice to terminate a tenancy (whether a "periodical tenancy or a tenancy for a term of years certain) "given in accordance with the provisions (whether express or "implied) of that tenancy." I think that there is great force in Mr. Parker's submission that subsections (3) and (4) are concerned with periodical tenancies and tenancies for a term of years certain.

Mr. Fox-Andrews submitted an argument to us under subsection (4) which was attractive. Conceding that subsection (3) does not avail him, he said that subsection (4) starts with the words "In the case of any other tenancy," and that a tenancy

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at will is within the words "any other tenancy." Then he said that the provision was: "A notice under this section shall not "specify a date of termination earlier than the date on which "apart from this Part of this Act the tenancy would have come "to an end by effluxion of time." Mr. Fox-Andrews argued that that is merely a limitation; that it is saying: "In the case of "any other tenancy it must not specify a date of termination "earlier than when a tenancy by effluxion of time would have "come to an end." But in reply to that submission Mr. Parker pointed to the word "the"; and I think there is great force in the argument that subsections (3) and (4) are referring to periodical tenancies and a tenancy for a term of years. But even if that be the right view, it does not seem to me that these subsections cut down either the definition of "tenancy" or cut down the provisions of section 25 (1) and (2). Subsection (1) provides that the landlord may terminate a tenancy by notice in the prescribed form specifying the date of termination. That was not done in this case. I think that the county court judge came to a correct conclusion also on this part of the case. I would dismiss the appeal.

*Appeal dismissed with costs.*

Solicitors: *Sole, Sawbridge & Co. for Bailey & Cogger, Tonbridge; Waterhouse & Co.*

M. M. H.

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*Oct.* 19.

Evershed M.R., Birkett and Romer L.JJ.

## CENTRAL LAND BOARD *v.* SAXONE SHOE CO. LTD.

*Town and Country Planning — Development — Assessment of development value—Licensed premises—Premises destroyed by war damage —Licence in suspense—Existing use—Change of use—Whether use as shop a material change requiring planning permission—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 61, *Sch. III — Town and Country Planning* (*Use Classes for Third Schedule Purposes*) *Order*, 1948 (*S.I.* 1948, *No.* 955).
"*Shop.*" "*Light refreshment.*"

The Central Land Board determined that on July 1, 1948, there was no development value in a vacant site formerly occupied as licensed premises which were destroyed by enemy action, on the ground that the restricted value was equivalent to the unrestricted value. This determination was made on the footing that for the purpose of calculating the restricted value of the site it had to be assumed that the premises could be rebuilt and that, in the event of their becoming unlicensed—for the licence was in suspense at the material time—the premises could be used for any of the shop purposes within class I of the Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948, No. 954), or class I of the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948, No. 955), and that such use of the premises would not involve a material change of use requiring planning permission. On appeal the Lands Tribunal held that the determination was wrong:—

*Held*, affirming the decision of the Lands Tribunal, that as the premises were an ordinary public house and were not being used as a "shop" as defined in the relevant orders, the uses which would be permitted (by virtue of section 61 (2) of the Town and Country Planning Act, 1947) or which would not constitute "development" (within section 12) would not include the use for any type of shop within the categories set out in either of the orders; that although the result was the same whether pursued under section 61 (2) or section 12, the former was the relevant section which, together with paragraph 6 of Schedule III and the order made thereunder [The Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948, No. 955)], constituted a comprehensive code for the ascertainment of development values of land.

APPEAL from the Lands Tribunal by case stated.

The Saxone Shoe Co. Ltd. appealed to the Lands Tribunal against a determination by the Central Land Board of the development value of land known as the "Waterloo Hotel," Oxford Street, Swansea, Glamorgan, of which the company were the freeholders. The Central Land Board determined that the unrestricted value of the land was £19,000 and was equal to the restricted value, so that there was no development value. The tribunal found that that determination was wrong and directed the Central Land Board to reduce the sum shown as the restricted value of the land to £6,300, thus altering the development value to £12,700. At the request of the Central Land Board the Lands Tribunal stated a case for the opinion of the court.

The case stated set out the facts which were proved or admitted before the Lands Tribunal thus: I (a) The land, the subject of the appeal, was on July 1, 1948, [the appointed day for the purposes of the Town and Country Planning Act, 1947] a vacant site, situated at the corner of Waterloo Street and Oxford Street, Swansea, with an area of 315 sq. yds., a frontage of 46 ft. to Oxford Street, 65 ft. to Waterloo Street, and a splay of 8 ft. at the corner. (b) It was formerly occupied by a building on four floors with a basement cellar. This building was destroyed during

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the late war. (c) The ground floor of this building was at the time of its destruction used as a public house licensed for the sale of intoxicating liquors for consumption on the premises. There was a lock-up shop on the corner with an area of 30 sq. yds. The upper part of the premises was used for the accommodation of the manager of the licensed premises. There was no accommodation for guests. There was normally sold upon the licensed premises not only alcoholic drinks but also non-alcoholic drinks and other light refreshments. (d) The licence was on July 1, 1948, held in suspense under the provisions of section 10 and Schedule VI of the Finance Act, 1942. (e) On the appointed day (July 1, 1948) for the purpose of Part VI of the Town and Country Planning Act, 1947 (hereinafter referred to as "the Act"), there was therefore a piece of vacant land, and in calculating the restricted value thereof, by virtue of section 61 (2) of the Act,[1] it was to be assumed that planning permission would be granted for the erection of a building within the conditions

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[1] Town and Country Planning Act, 1947, s. 61: "(1) For the purposes of this Part of this Act [Part VI] and of any scheme made thereunder an interest in land shall be deemed to be depreciated in value by virtue of the provisions of this Act if the restricted value of that interest on the appointed day [July 1, 1948], calculated in accordance with the provisions of this and the next following section, is less than the unrestricted value of that interest on that day as so calculated; and references in this Part of this Act to the development value of an interest in land shall be construed as references to the difference between those values. (2) Subject to the following provisions of this section—(*a*) the restricted value of an interest in land on the appointed day shall be taken to be the value of that interest as it subsists on that day, calculated on the assumption that planning permission would be granted under Part III of this Act for development of any class specified in the Third Schedule to this Act, but would not be so granted for any other development; . . . (5) For the purposes of this section, the restricted and the unrestricted values of interests in land shall be calculated by reference to prices current immediately before January 7, 1947, and for that purpose any such interest shall be treated as if it had been subsisting immediately before that date with all incidents to which it is subject on the appointed day . . . and the land shall be treated as having been immediately before that date in the same state as it is on the appointed day: . . ."

Sch. III, para. 1: "The rebuilding, as often as occasion may require, of any building which was in existence on the appointed day and of any building which was in existence before that day but has been destroyed or demolished since January 7, 1937 (including the making good of war damage which has been sustained by any such building), . . ."

Para. 3: "The enlargement, improvement or other alteration, as often as occasion may require, of any such building as is mentioned in paragraph 1 of this Schedule, or any building substituted therefor by the carrying out of any such operations as are mentioned in that paragraph . . ."

Para. 6: "In the case of a building or other land which, on the of paragraph 1, and so far as material paragraph 3 of Schedule III to the Act with the provisions as to use set out in paragraph 6 of the same Schedule [1] and Part III of the Act. . . .[2]

(f) In the course of carrying out their duties under the Act of 1947 and for the purpose of those duties the Central Land Board made, inter alia, the following ruling:

"*Existing Use Value—De-licensed Premises*

"The Central Land Board have made the following ruling: "When licensed premises have become de-licensed either volun- "tarily or as a result of redundancy or removal, the board will

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"appointed day, was used for a pur- "pose falling within any general "class specified in an order made by "the Minister for the purposes of this "paragraph, or which, being unoccu- "pied on the appointed day, was last "used . . . for any such purpose the "use of that building or land for any "other purpose falling within the "same general class."

The order made for the purpose of the foregoing paragraph 6 was the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948, No. 955). Class I in the Schedule to this order is: "Class I—Use as a shop for any "purpose except as:—(i) a fried "fish shop; (ii) a tripe shop; (iii) a "shop for the sale of pet animals or "birds; (iv) a cats-meat shop."

By para. 2 of that order "shop" was defined as: "a building used for "the carrying on of any retail trade "or retail business wherein the "primary purpose is the selling of "goods (excluding refreshments other "than light refreshments) by retail, "and without prejudice to the gener- "ality of the foregoing includes a "building used for the purposes of "a hairdresser, undertaker, ticket "agency or receiving office for goods "to be washed, cleaned or repaired, "or for other purposes appropriate to "a shopping area, but does not in- "clude a building used as an amuse- "ment arcade, pin-table saloon, fun- "fair, garage, petrol filling station, "hotel or premises licensed for the "sale of intoxicating liquors for con- "sumption on the premises."

[2] Part III of the Act included s. 12: "(2) In this Act, except where "the context otherwise requires, the "expression 'development' means "the carrying out of building, engin- "eering, mining or other operations "in, on, over or under land, or "the making of any material change "in the use of any buildings or other "land: Provided that the following "operations or uses of land shall not "be deemed for the purposes of this "Act to involve development of the "land, that is to say:—. . . (*f*) in "the case of buildings or other land "which are used for a purpose of any "class specified in an order made by "the Minister under this section, the "use thereof for any other purpose "of the same class." [The order so referred to is the Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948, No. 954). The definition of "shop" in that order and Class I in the Schedule to the order are the same as the corresponding definitions in the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948, set out above. The Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948, No. 954), has now been repealed and replaced by S.I. 1950, No. 1131.]

"(5) Notwithstanding anything in "this section, permission shall not be "required under this Part of this "Act—. . . (*c*) in the case of land "which on the appointed day is un- "occupied, in respect of the use of the "land for the purpose for which it "was last used: . . ."

"regard the existing use of the premises as falling within "class XIV of the Use Classes Order [The Town and Country "Planning (Use Classes) Order, 1948 (S.I. 1948, No. 954)[2]] (i.e., "hotel or boarding house, etc.). If, however, sleeping accommodation was not provided, and the premises were primarily used "only for the sale of light refreshments—which includes the "sale of intoxicating liquors—the board would regard the existing use as including any of the shop purposes within class I of "the Use Classes Order. If the premises fall within the latter "category, no development charge will be payable for the use of "the premises as a shop. If the existing use on the relinquishment "of a licence is any use falling within class XIV of the Use "Classes Order, however, the question of whether any development charge is payable for conversion into a shop will depend "on the facts of the particular case, i.e., as to whether use "as a shop in the particular situation is more valuable than "any use for any other purpose falling within class XIV."

The question stated for the opinion of the court in paragraph 3 of the case was which of the agreed alternative valuations was correct: "(*a*) . . . that, for the purpose of arriving at the "restricted value, the existing use of the former licensed premises on part of this land would include the right, in the "event of their becoming unlicensed, to use, as dwelling accommodation, the part formerly used for dwelling purposes and to "use the remainder thereof for any of the shop purposes within "class I of the Town and Country Planning (Use Classes) Order, "1948 (S.I. 1948, No. 954), or class I of the Town and Country "Planning (Use Classes for Third Schedule Purposes) Order, "1948 (S.I. 1948, No. 955), . . ."; or "(*b*) . . . for the purpose "of arriving at the restricted value, the existing use of the "former licensed premises on part of this land would include the "right, in the event of their becoming unlicensed, to use as "dwelling accommodation the part formerly so used but would "not include the right to use the remainder thereof for any of "the shop purposes within class I" of the above-mentioned orders.

*J. Ramsay Willis* for the Central Land Board. The validity of the determination of the Central Land Board depends on whether the calculation by the board of the restricted value is correctly made on the footing that, if the licence now in suspense is not renewed, nothing in the Town and Country Planning Act,

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[2] See note on p. 291.

1947, would prevent the land from being used for the purpose by which, it is agreed, the highest potential value of the land could be realized, that is, for use as a shop. That involves showing that use as a shop was, within paragraph 6 of the Third Schedule to the Town and Country Planning Act, 1947, use for a purpose falling within the same general class specified in paragraph 2 and the Schedule to the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948, No. 955), as that for which the premises were last used. Such a use is by virtue of section 12 (2) (*f*), (5) and the order referred to in subsection (2) (*f*), that is, the Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948, No. 954),[2] deemed not to involve " development " of the land, so that planning permission would not be required.

Under section 61 (2) and the Third Schedule the question is whether the premises were last used as a shop within the meaning of the relevant order (S.I. 1948, No. 955). Licensed premises are, it is conceded, expressly excluded from the scope of that order. The licensed part of the premises was, however, used also to a substantial extent for the sale by retail of light refreshments and non-alcoholic drinks which, if taken by themselves, would admittedly be within the general use class of a shop. Where before the occurrence of war damage premises were being used for several purposes, it is not obligatory in calculating the restricted value to assume that on rebuilding all the purposes for which the premises were previously used would be resumed. If at the relevant time the premises were being used as a shop, although also used for other purposes, it is open to the owners to rebuild the premises for use as a shop without obtaining planning permission. If, for example, the brewers had decided not to continue the licence, these premises could, within the sense and meaning of the Act, have been continued to be used for the sale of light refreshments by converting them into a milk bar, and planning permission would not have been needed to do that. Nor would there be any logical distinction between using the premises as a milk bar and for the sale of boots and shoes. It is conceded that it might be a question of degree depending on the facts of each case whether the nature of the trade carried on in the premises before the licence was taken away was such that, but for the licensed trade, the premises would have been within the definition of " shop." If so, then on the discontinuance of the licensed trade the disability imposed by paragraph 2 of the order S.I. 1948,

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[2] See note on p. 291.

No. 955, would be removed, the premises would come within the definition of " shop " and could be used for any other of the shop purposes without the necessity of obtaining planning permission. In some cases the alternative use may, of course, be insignificant, but in the present case the sale of non-alcoholic drinks and light refreshments was a substantial part of the trade carried on in this part of the premises.

Alternatively, it is submitted that the notional proposed use of these premises is not " development " within section 12 for which planning permission is required. By virtue of subsection (5) one can, on rebuilding, resume use for any one of the purposes specified in the same use class in the relevant order (S.I. 1948, No. 954), and if in fact the premises were, before the damage, used for selling goods by retail, it is immaterial to inquire what were the goods sold.

*G. D. Squibb* for the company, the freeholders. Since the problem is to ascertain the development value of the land, the relevant section is section 61, which, with the Third Schedule and the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948, No. 955), provides a comprehensive code for the ascertainment of development value. The board has conceded that licensed premises are expressly excluded from the definition of " shop " in that order, and, since that was the last use for which the premises were used, they are, at first sight, outside paragraph 6 of the Third Schedule and, therefore, outside the concession relating to shop premises for the purpose of assessing the restricted value under section 61 (2) (*a*). The premises cannot, it is submitted, be at one and the same time " not a shop " because they are a public house, and " used for " shop purposes " because they are used for the sale of light refreshments and non-alcoholic beverages. Looking at the substance of the matter, this was, on the evidence, an ordinary public house; it is quite usual to sell non-alcoholic drinks and light refreshments in the course of running the business of a public house. If, as is submitted, the premises are outside the scope of the order S.I. 1948, No. 955, the board cannot succeed under section 61. The order made under section 12 (S.I. 1948, No. 954) was in identical terms and the same fate must, therefore, befall the argument submitted on behalf of the board under that section. But, in any case, section 12 is not relevant here. It is not concerned with valuation but with what is to be regarded as " development," and it cannot conveniently be read into section 61 because there is a divergence between the two sections.

Section 61 (2) is drafted on the basis that the things referred to in the Third Schedule are "development," but by the proviso to section 12 (2), paragraph (*f*), the operations there referred to, which are the same as those mentioned in S.I. 1948, No. 955, are not to be deemed to be "development." Section 12 has, therefore, a fundamentally different approach from section 61. Further, section 12 does not deal with rebuilding. Section 12 (5) does not help the board's argument, for the premises were last used as a public house and it is not now sought to use them for that purpose.

*J. Ramsay Willis* replied.

Evershed M.R. The question posed for our determination in this appeal is a short one, but for myself, being relatively unaccustomed to deciding cases falling under the Town and Country Planning Act, 1947, I confess that I have not found it entirely easy. The question itself is stated clearly enough in paragraph 3 of the case stated. As Birkett L.J. pointed out, there are there presented two alternative views of arriving at a valuation for the purposes in hand.

In (*a*) there is stated one alternative view. [His Lordship read paragraph 3 (*a*) and continued:] On that basis the development value is nil, for the restricted value is equivalent to the unrestricted value.

[His Lordship read paragraph 3 (*b*) and continued:] On that alternative the restricted value is reduced to £6,300, so as to leave a balance figure for the development value of £12,700.

From my reading of that paragraph it is, I think, apparent that the real question, and the only one, is whether, apart from the dwelling accommodation, the remainder of the premises here in question may or may not be used, for the purposes of making the valuation, for shop purposes within the classes stated.

The premises in question were originally used as a public house. They are described as having been situated at the corner of Waterloo Street and Oxford Street, Swansea. The premises were destroyed by enemy action during the late war and have been at all material times and still are, as I understand, a vacant site. I think that is a sufficient statement of the facts for present purposes, save only this: that, as stated in the case, and as I think will be the common experience for public houses, there were normally sold on the licensed premises not only alcoholic drinks but also non-alcoholic drinks and other light refreshments. In order to dispose at once of one small point, the phrase "light refreshments" is in this sort of connexion a term of art. At least, I am satisfied that it was used in the code as a term of art, and means eatables not cooked on the premises but including beverages of all kinds.

I take my definition in fact from the two Town and Country Planning (Use) Orders; but I assume (and I express my opinion in this case on the assumption) that we are here concerned with the cleared site of what was an ordinary public house as that term is commonly understood: a place resort to which would primarily be had for obtaining alcoholic refreshment, but in which there would also be sold, as ancillary to the main business and in the same parts of the premises, non-alcoholic drinks and also some light refreshments, that is, perhaps bread and cheese or biscuits.

The problem being one of ascertaining the development value of the land, the court is directed primarily and essentially, as Mr. Squibb contended, to section 61 of the Town and Country Planning Act, 1947. That section is directed to this very purpose of ascertaining the value. [His Lordship read section 61 (1) and went on:] Let me repeat by way of reminder that the question raised here is, exclusively, what is in this case the restricted value? I pass, therefore, to subsection (2). [His Lordship read subsection (2) and continued:] The subsection then states how the unrestricted value, which is the other integer in the calculation, is to be arrived at. [His Lordship read subsection (5) and continued:] Again let me repeat by way of reminder that on the appointed day this site was vacant as the consequence of enemy action.

In order, then, to discover what planning permission, it must be assumed, will be granted for the purpose of arriving at the figure for restricted value in accordance with the directions I have read in subsection (2), it becomes necessary to turn to Schedule III. That consists of a number of paragraphs consecutively numbered. Though the paragraphs are in fact divided into two parts, the latter division is not material for my present purpose. The first paragraph includes the rebuilding of any building which was in existence on the appointed day. As I have said, there was no building here in existence on the appointed day. But it also includes "and of any building which "was in existence before that day but has been destroyed" since a date in 1937. So that by virtue of that paragraph, development which consists in rebuilding is included in development under Schedule III.

Paragraph 6 provides as follows: "In the case of a building "or other land which, on the appointed day, was used for a "purpose falling within any general class specified in an order "made by the Minister for the purposes of this paragraph, or "which,"—this is particularly applicable here—"being unoccupied on the appointed day, was last used"—otherwise than before the date in 1937 already indicated—"for any such "purpose, the use of that building or land for any other purpose "falling within the same general class."

Pursuant to section 111 of the Act, the Minister made an order (S.I. 1948, No. 955) which specified the classes indicated in the paragraph which I have last read. It is a point to be noted that by section 111 (4), an order made by the Minister for the purpose of paragraph 6 of Schedule III shall not be amended or revoked at any time after the appointed day. In that respect such an order differs from an order made under another provision of the Act, i.e., section 12—a point to which I shall come back hereafter. By paragraph 2 of the order S.I. 1948, No. 955, the word "shop" is thus defined: "'shop' means a building used "for the carrying on of any retail trade or retail business wherein "the primary purpose is the selling of goods (excluding refreshments other than light refreshments) by retail, and without "prejudice to the generality of the foregoing includes a building "used for the purposes of"—and then a number of purposes are set out which are not perhaps obvious retail trades—"but does "not include a building used as"—and then among a number of items appears this: "premises licensed for the sale of intoxicating liquors for consumption on the premises."

With that definition in mind, I turn to what were proleptically called "general classes" in paragraph 6 of Schedule III. The first general class is thus stated: "Use as a shop for any "purpose except as"—and then there are four exceptions which have no application to the present case.

If, therefore, for the purposes in hand, section 61 forms the code to which, and to which exclusively, the court is directed to turn, it would appear that the answer to the problem may be thus briefly stated: Having regard to the use to which this public house was put at the time of its destruction, can it fairly be said that it was being used as a shop? If so, then by virtue of section 61 (2) (*a*) the restricted value must be arrived at on the assumption that it could be used, and that planning permission would be granted for its use, as a shop of any other kind, with the sole exception, of course, of the four excluded items.

At first blush I must confess that to describe a public house as premises used as a shop would not appear to be sensible, and to that view further emphasis is given by the express exclusion, in the definition of a "shop," of premises licensed for the sale of intoxicating liquors for consumption on the premises. For this was such a place, and, as I have said—and I am conscious of this assumption—the sale of the other eatables and beverages would be upon the premises licensed, strictly so called. But Mr. Willis has contended that although these premises were a public house, and therefore can be described as premises licensed for the sale of intoxicating liquors for consumption on the premises, that is not an exhaustive statement of the uses to which the place as a whole was put at the relevant date; and the burden of his argument has been to the effect that, since light refreshments other than intoxicating liquors were sold on the premises, and since the sale of light refreshments by retail is in terms within the definition of "shop," therefore these premises were being used as a shop at the relevant date, albeit they were also being used for purposes not appropriate, according to the definition, to use as a shop.

Mr. Willis put perhaps most forcibly his point by this test: Let it be supposed, he said, that the owners or lessees, the brewers, determined that they would not continue the licence, or let it be supposed that the licence was lost or abandoned; could the brewers then, within the sense and meaning of this Act, without obtaining planning permission, persist in the use of the premises for the sale of light refreshments by converting them (to take Mr. Willis's example) into a milk bar?

Having regard to the former use, there is obvious force and commonsense in the view that the change from the one to the other is not of so great or significant a character as to make one suppose that planning permission would be required. But if Mr. Willis's test is to be affirmatively answered in the case he put, then it must also follow, as Mr. Willis conceded, that these brewers could equally, without asking for planning permission, arrange, by a subtenancy or otherwise, to change the character of the premises far more fundamentally, namely, by converting them in effect from a public house into a shop for the sale, for example, of boots and shoes.

Again it is a matter of commonsense. If it be permissible to appeal to such a standard in this kind of context, that would appear to be a somewhat substantial and significant change in the character of the use; and for my part I think the answer is in truth to be supplied in the way in which Mr. Willis was, I think, at first disposed to concede, namely, that one must look at the substance of the matter.

Looking at the substance of the matter, it seems to me that this public house was not at the relevant date a shop within the definition of the order which I have read [1]; and if that is right, then no assistance can be got by Mr. Willis from his appeal to section 61 (2); for it would follow from what I have said that one can no longer assume that planning permission would be granted for use as a shop of any kind within the class.

But Mr. Willis contended further that that, after all, is not the end of the matter; he said that, for the purpose of arriving at the restricted value, it is true that one makes an assumption that planning permission will be granted where planning permission would otherwise be required; but Mr. Willis contended that there still remains a field of use for which in no circumstances planning permission would be required, and that if one has regard to that scope of use, then one finds that the restricted value is equivalent to the unrestricted value.

In order to make good that part of the argument, Mr. Willis fell back upon section 12. He was, I think, met at first with the difficulty that section 12 is directed, not to ascertaining restricted value, but to the formulation of the circumstances in which planning permission is required; and it is not directed to the case of rebuilding.

The answer to that difficulty Mr. Willis found in subsection (5) (*c*) of the section, to which I will come later. But the two sections, section 61 and section 12, seem to pose a certain contradiction to which Mr. Squibb drew our attention. I have already read section 61 (2), and if that subsection is read together with the order which was made under it,[2] it seems clearly to proceed upon the hypothesis that in order to convert these premises, assuming for the moment they had not been destroyed, to some use different from their actual use, one would be involved in what is called "development."

I will read again the essential words of section 61 (2) (*a*): ". . . calculated on the assumption that planning permission "would be granted . . . for development of any class specified in "the Third Schedule." Section 12, however, seems to exclude from the scope of the word "development" the very uses which section 61 (2) (*a*) implicitly regards as "development." The answer to that somewhat strange antinomy may lie in this—that the order which was made under section 12,[3] unlike the order which was made under section 61,[4] is alterable. It does so happen that at the present time the relevant terms of the two orders are identical, but it might not always be so.

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[1] The Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948, No. 955).

[2] S.I. 1948, No. 955.

Let me, however, turn to section 12. [His Lordship read section 12 (2) and continued:] I note, though I do not desire merely to make criticisms of the drafting, that, whereas the main body of subsection (2) speaks of "buildings or other land," the proviso is on the face of it at first limited to land. That limitation obviously is insignificant having regard to paragraph (*f*) of the proviso, which is the relevant one, and which reads: "in the case of buildings or other land which are used for a "purpose of any class specified in an order made by the Minister "under this section, the use thereof for any other purpose of "the same class."

What I have read seems to involve this conclusion, that what would otherwise be the making of any material change in the use of the building is not "development" for the purposes of the Act if that material change is merely a transfer, so to speak, from one type of use to another in the same class, as stated in the order indicated.[5]

The order indicated, S.I. 1948, No. 954, as I have stated, contains precisely the same definition of "shop" and precisely the same language for class I, "use as a shop for any purpose," as we find in S.I. 1948, No. 955. If, therefore, the original use of the public house was use as a shop, then use as another kind of shop would not be a material change, viz., a development under section 12 (2). But in my judgment the conclusion I have reached under section 61, which I think strictly to be the material section, is equally and necessarily available to Mr. Squibb under section 12 (2); in other words, as I construe the class, with the definition of "shop" written in instead of the word "shop," these premises were not being used as a shop at the date when they were last used.

I have earlier said that if Mr. Willis sought to rely exclusively on section 12 (2), he might be in the added difficulty that here there are no buildings and we are not, therefore, in terms within the proviso which relates only to buildings in fact being used for some purposes. But Mr. Willis falls back for this purpose on subsection (5), which is, so far as relevant, as follows: "Notwithstanding anything in this section, permission shall not "be required under this Part of this Act— . . . (*c*) in the case "of land which on the appointed day is unoccupied, in respect "of the use of the land for the purpose for which it was last "used."

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[3] The Town and Country Planning (Use Classes) Order, 1948 (S.I. 1948, No. 954).

[4] S.I. 1948, No. 955.

[5] S.I. 1948, No. 954.

Now, it was last used as a public house, and Mr. Willis therefore says that re-application to that use is not, by the terms of subsection (5), development. That, however, is, I think, insufficient for him, because what is here in question does not depend upon these premises being used as a public house. In order to succeed, the landlords must say that they are entitled, without involving themselves in any development, to use the reconstructed premises as a shop.

I myself find some difficulty in expanding paragraph (*c*) of subsection (5) to so generous a scope as is given to paragraph (*f*) of subsection (2) by virtue of S.I. 1948, No. 954; but, so far as I can see, even if I were so to expand the words for the purpose, still I find the same answer to the case put on that paragraph as I have found to the case put on the other paragraphs already considered.

The conclusion, then, on the whole matter—and I follow both Mr. Willis and Mr. Squibb in not indulging in elaboration—is that I think, reverting to paragraph 3 of the case stated, that for the purposes of finding the restricted value one cannot say that the uses which would be permitted or which would not constitute development would include the use as any type of shop within the categories set out in either of the orders; in other words, I concur, for my part, with the conclusion which the tribunal reached. I confess to this much regret in so doing. As Mr. Willis has observed, and, as I understand him, the conclusion does go counter to the view upon which the Central Land Board appear to have acted. That view is contained in a ruling which is to be found in sub-paragraph (*f*) of the first paragraph of the case stated. I am bound to say that I do not think the paragraph, applied to this particular case, is very clear; but that may be my fault. I am confining my judgment in this case to the facts as I have understood or assumed them, namely, that we are here concerned with the ordinary well-known case of a public house. It may well be that there are other establishments where the sale of intoxicating liquors does not so predominate over all other activities that one could say, as I think one cannot on the facts I have treated as being the facts in this case, that the premises were being used, though not exclusively used, as a shop. But so far as this particular appeal is concerned, for the reasons I have tried to state, I have felt constrained to the view which commended itself to the tribunal, and I think, therefore, that the appeal should be dismissed.

BIRKETT L.J. I am entirely of the same opinion. [His Lordship referred to the facts and continued:] The view I take about that paragraph [paragraph 1 (*c*) of the case stated] is that it is descriptive of an ordinary public house. In almost every public house it is a part of the business of the licensee to sell upon the premises not merely alcoholic drinks, but non-alcoholic drinks, and light refreshments. I read that statement as a statement that there was formerly on this vacant piece of land an ordinary public house.

The earlier part of the case sets out what I may call the machinery—how the matter comes before the court; and then in paragraph 3, two alternative agreed views are quite clearly stated; and, as I put to Mr. Squibb in the course of the argument, they are identical save in this all-important matter, that in 3 (*a*) it says—" to use the remainder thereof for any of " the shop purposes within class I "—which is the contention of the Central Land Board, and in (*b*) " would not include the " right to use the remainder thereof for any of the shop purposes " within class I "—which is the contention of the company; and Mr. Squibb said, and I think rightly said, that that point is the only point in the case. Is the Central Land Board right, or is the company right? That is the question.

The question has been a little complicated, I quite agree, by paragraph 1 (*f*). That is the quotation from the ruling of the Central Land Board; but we are not told with any detail how that ruling was given, or in what circumstances, or to what it applied. It seemed to me to be quite plain that it was not concerned with a case like the present one. The Central Land Board, under Part VI of the Act of Parliament, had to deal with the question of payments for the depreciation of land values, and they set up the £300 million fund for that purpose. Section 61, to which frequent reference has been made, of course, comes within that Part of the Act; but in Part VII the Central Land Board had to deal with development charges—not depreciation of land values as to which they were going to pay out, but development charges, as to which they were going to levy sums of money; and this ruling, which begins "Existing "Use Value—De-licensed Premises," seems to me perfectly plainly a ruling under Part VII; because it begins: "The Central "Land Board have made the following ruling: When licensed "premises become de-licensed either voluntarily or as a result of "redundancy or removal, the board will regard the existing use "of the premises as falling within class XIV of the Use Classes "Order." Class XIV is: "Use as a boarding or guest house, "a residential club, a hostel or a hotel providing sleeping accom-"modation." "If, however, sleeping accommodation was not "provided," the ruling went on, "and the premises were "primarily used only for the sale of light refreshments—which "includes the sale of intoxicating liquors—the board would "regard the existing use as including any of the shop purposes "within class I of the Use Classes Order. If the premises fall "within the latter category, no development charge will be "payable for the use of the premises as a shop." The words "no development charge will be payable" are clearly dealing with Part VII. "If the existing use on the relinquishment of a "licence is any use falling within class XIV of the Use Classes "Order, however, the question of whether any development "charge is payable for conversion into a shop will depend on the "facts of the particular case."

It seems to me perfectly plain, therefore, that this ruling which is cited in paragraph 1 (*f*) relates solely, as a matter of business utility and practice, to development charges, and was not intended to govern the decision of questions with which we are concerned today.

As regards the point with which we are concerned in the present case, namely, the contention of the Central Land Board that this site may be used for any of the shop purposes, as against the company's contention that it cannot, I have really nothing to add to what my Lord has said upon that matter, and, looking at the decision which is stated in paragraph 7 of the case stated, "I found that the determination of the Central "Land Board was wrong, and directed the board to alter its "determination to the figures alternatively agreed . . . giving a "development value of £12,700," I think that that was a proper and just determination and I agree with it.

ROMER L.J. I quite agree, and I only want to say a word or two. Mr. Willis founded his case in the first place on section 61 of the Act, coupled with Schedule III and the order which the Minister made thereunder, which was S.I. 1948, No. 955; and alternatively, he relied on section 12 and the order which the Minister made under that section, which was S.I. 1948, No. 954. It may be—and I think it is the fact—that one arrives at the same conclusion adverse to Mr. Willis's clients, whichever section and order one applies. But for myself, I think that Mr. Squibb was quite right when he said that section 12 does not really enter into the picture at all so far as the present problem is concerned; and that section 61 and Schedule III and the order which was made under that schedule constitute a comprehensive code for the purposes of the ascertainment of development values of land. In my opinion section 12, which, it is to be observed, comes in a different part of the Act altogether, Part III, which deals with control of development, is directed to providing what the public can do and what they cannot do without permission in relation to the development of their land. As I say, even if one did resort to section 12, I think one arrives at the same result; but I think it right to say that in my opinion section 61 for the present purposes is the only section that one need bear in mind. I agree with the order proposed.

*Appeal dismissed.*

Solicitors: *Treasury Solicitor; Rowe & Maw.*

E. D.

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*July* 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26;
*Oct.* 5, 6.

Havers J.

## HAWKESLEY *v.* MAY AND OTHERS.

[1952 H. No. 421.]

*Trust and Trustee—Breach of trust—Duty to inform and pay cestui que trust—Retention of capital and income by trustees—Cestui que trust absolutely entitled as joint tenant to capital and interest of trust fund—Duty of trustees to inform cestui que trust upon attaining twenty-one of interest in settlement—Duty to pay income to cestui que trust without demand—Duty to pay capital to cestuis que trust without demand—No obligation on trustees to inform cestui que trust of right to sever.*

*Joint Tenancy—Severance—Method and effect—Severance by act of tenant—Joint tenants absolutely entitled to trust fund on attaining twenty-one—Severance of income—Right of joint tenant to income from share before severance of capital.*

A settled fund was held by trustees upon trusts under which on attaining the age of 21 the plaintiff and his younger sister became absolutely entitled as joint tenants. Upon the plaintiff's coming of age the trustees, having been advised by their solicitor that until both joint tenants attained the age of 21 or until severance by the plaintiff it was their duty to retain the capital and re-invest the income, took no steps to transfer to the plaintiff his share of the capital or to pay him the income therefrom, but retained the whole of the fund in their own hands and accumulated the income. After the plaintiff's sister came of age she severed the joint tenancy and her share of the capital was transferred to her, but the trustees continued to hold the plaintiff's share of the capital and to accumulate the income until the following year when the whole amount due to the plaintiff under the trust was transferred to trustees of a voluntary settlement entered into by the plaintiff. The plaintiff was at all material times in ignorance of his rights under the settlement and at no time did he demand payment from the trustees of either the capital of or income from his share. The plaintiff brought an action at common law against the trustees and their solicitor for conspiracy and against the trustees for breach of trust:—

*Held*, 1. That the plaintiff, on attaining the age of 21, became entitled before severance of the capital to the income arising from his share of the trust funds.

*Walmsley* v. *Foxhall* (1870) 40 L.J.Ch. 28 followed.

2. That there was a duty upon the trustees to inform the plaintiff upon his attaining the age of 21 that he had an interest in the capital and income of the trust funds, since there was a distinction between the position of a trustee and an executor, in that a trust deed was a private document to which the cestui que trust had no access, whereas a will was in a sense a public document and, therefore, the doctrine that there was no legal duty upon an executor to give notice of the terms of a legacy to a legatee should not be extended to a trustee under an express trust.

Dicta of Lord Cranworth L.C. in *Burrows* v. *Walls* (1855) 5 De G.M. & G. 233, 253, and of Giffard V.-C. in *Brittlebank* v. *Goodwin* (1868) L.R. 5 Eq. 545, 550, applied.

*In re Lewis* [1904] 2 Ch. 656 and *In re Mackay* [1906] 1 Ch. 25 considered.

3. That although it was their duty to explain to him that he was entitled to call for and have the interest paid to him, and to disclose to him on demand any deed or document relating to the trust (including an opinion by counsel as to its effect), there was no obligation on the trustees to give to the plaintiff legal advice or to inform him of his right to sever.

4. That it was the duty of the trustees to pay the income from his share of the trust fund to the plaintiff on his attaining the age of 21 without any demand by him.

*Low* v. *Bouverie* [1891] 3 Ch. 82; 7 T.L.R. 582 considered.

5. That it was also the duty of the trustees to pay the capital of the trust fund to the plaintiff and his sister as joint tenants

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upon the sister attaining 21, or after severance to each of them, without any demand by them, and that, accordingly, the trustees had been guilty of breaches of trust.

*Wroe* v. *Seed* (1863) 4 Giff. 425 applied.

*Held*, further, on the facts, that the allegations of conspiracy had not been made out and that, as the trustees had acted honestly and reasonably on the advice of their solicitor, they would be entitled to relief under section 61 of the Trustee Act, 1925, in respect of the breaches of trust.

ACTION.

The following is a summary of the facts relevant to this report found by Havers J. By a settlement made on June 19, 1893, a settlor, Thomas Hawkesley, settled certain funds upon his daughter, Mrs. Florence Musgrave, and, in the events which happened, after her death upon trust for the issue of Charles Hawkesley as she should appoint. By her will dated June 10, 1927, Mrs. Musgrave appointed to her great nephew and great niece, Harry Stephen Ronald Hawkesley, the plaintiff in this action, and Cicely Winifred Hawkesley, his sister, such trust funds as she was compelled to leave back into the family. Mrs. Musgrave died on December 8, 1930, and on February 18, 1934, Luxmoore J. declared,[1] inter alia, that the plaintiff and his sister took an absolute interest in the property subject to the power of appointment (hereinafter referred to as the Musgrave settlement); and in 1934 the trustees of the settlement obtained an opinion of counsel to the effect that the plaintiff and his sister took as joint tenants.

The first defendant, Charles Henry May, a solicitor, became a partner in his father's firm in 1920; the firm had acted as solicitors to the Hawkesley family for over a hundred years, and his father until his death in January, 1940, was a trustee of the Musgrave settlement. Although until then he had had little to do with the matter, from January, 1940, the first defendant, on behalf of his firm, had acted as solicitor to the trustees of the settlement. The second defendant, Sir Charles Lethaby Tidy, had been a trustee of the settlement since 1919, and the third and fourth defendants, May Collins and Frank Evelyn Jones, were the executors of Arthur Collins, deceased, who at all material times had also been a trustee of the settlement.

The plaintiff was born on February 28, 1918, and his sister, Cicely Winifred Hawkesley, on February 28, 1921.

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[1] *In re Hawksley's Settlement* [1934] Ch. 384, 401; 50 T.L.R. 231.

After the plaintiff had come of age the trustees of the Musgrave settlement, having been advised by their solicitor that it was their duty, until both joint tenants had attained the age of 21 or until severance by the plaintiff, to retain the capital of the trust and to re-invest the income, took no steps to pay the income of the plaintiff's share to the plaintiff, but retained the whole of the fund in their own hands and accumulated the income.

On February 27, 1942, the plaintiff's sister came of age, and on March 16, 1942, the first defendant's firm, acting on behalf of the trustees, wrote to the plaintiff and his sister enclosing in each letter a statement showing the investments held under the Musgrave settlement and the proportions due to be transferred to each of them, and asking for instructions as to what they should do with the trust funds. The letter addressed to the plaintiff was intercepted by his father and never received by the plaintiff, but his sister received the letter addressed to her; on March 18 she replied, asking that the dividends be paid into her bank account, and in September, 1942, the sister's share of the trust funds was transferred to her.

On March 18, 1942, the plaintiff's father wrote to the first defendant requesting him to suspend the transfer of the investments to the plaintiff and informing him that solicitors to whom the plaintiff would be entrusting the future conduct of the matter would no doubt be communicating with him. On April 4, 1942, a firm of solicitors wrote to the first defendant's firm informing them that they were acting for the plaintiff in arrangements which were being made with his father, and enclosing a written authority, undated, signed by the plaintiff, authorizing the first defendant's firm to supply them with any information or documents they desired regarding his affairs. Thereafter, that firm of solicitors were in constant communication with the first defendant's firm regarding the winding up of the Musgrave settlement. On July 3, 1942, the plaintiff purported to enter into a voluntary settlement of certain securities to which he had become entitled, and in February, 1943, the trustees, acting on the advice of the first defendant's firm, transferred the capital and accumulated income to which the plaintiff was entitled under the Musgrave settlement to the trustees of the voluntary settlement.

On April 9, 1948, the plaintiff's father died, and on January 28, 1952, the plaintiff, alleging that at all material times he had been unaware of his rights under the Musgrave settlement, issued a writ claiming, inter alia, against all the defendants damages for conspiracy to injure him, and against the last three defendants damages, inter alia, for breach of trust. The plaintiff alleged that the defendants at all material times had known that he was ignorant of his entitlement under the Musgrave settlement and that in the circumstances it was the continuing duty of the trustees upon his attaining the age of 21 years and thereafter (a) to inform him of his rights and interest under the settlement, (b) to transfer to him his share of the capital funds held on the settlement trusts and (c) to pay to him thereafter any income arising from the share to which he had become entitled. The substance of the alleged conspiracy was that from about February, 1940, the first defendant and the trustees had conspired together with the plaintiff's father and with each other to injure him by keeping him in ignorance of his rights under the Musgrave settlement and by withholding from him his share in the trust funds and in the income from them, and to commit or cause to be committed on the procurement of the first defendant and the plaintiff's father, or one of them, breaches of trust and duty owed by them to the plaintiff; and he specified various overt acts alleged to have been committed in furtherance of the alleged conspiracy. Further or alternatively, the plaintiff alleged breach of trust, conversion and fraud, and he claimed damages for conspiracy and an account or other relief.

The defendants denied the allegations; alternatively, they relied upon section 2 (1) (a) and section 19 (2) of the Limitation Act, 1939. The plaintiff, in reply, relied on section 19 (1) of the same Act.

This report is solely concerned with the questions of law arising out of the plaintiff's allegation of breaches of trust.

*Neil Lawson Q.C.* and *R. J. Parker* for the plaintiff. The duties of trustees in this connexion are correctly set out in Halsbury's Laws of England, 2nd ed. (1939), vol. 33, p. 229, para. 410, and reliance is placed on *Burrows* v. *Walls.*[2] The plaintiff became entitled to the income from his share of the trust funds on attaining the age of 21, and the trustees were therefore guilty of breaches of trust in that they (a) failed to inform him of his interest under the settlement and of his right to sever, (b) failed to pay to him the income to which he was entitled, and (c) failed to transfer to him the capital on his share on severance on February 28, 1939, or March 18, 1940.

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[2] (1855) 5 De G.M. & G. 233.

*Kenneth Diplock Q.C.* and *Helenus Milmo* for the first defendant. When the plaintiff came of age in February, 1939, he became entitled to sever either by declaration of intention or by sale; until severance the joint tenancy continued as regards the capital, but whether there was a severance of the income of his share is doubtful: see *Walmsley* v. *Foxhall*,[3] which is the only authority on this question. In any event, there was no duty on the trustees to pay the income to the plaintiff without any demand by him. Where there is an interest in income which is not a vested interest, there might be a duty to pay the income to the beneficiary entitled (see section 31 of the Trustee Act, 1925), but where the interest is vested there is no obligation to pay in the absence of a demand: contrast the expression "the "trustees shall thenceforth pay the income" in section 31 (1) (ii) of the Trustee Act, 1925, with "the trustees shall hold . . . in "trust . . . absolutely" in section 31 (2) (i).

There is no duty upon trustees to inform a beneficiary either of the existence of the trust or of his rights under it. In *Burrows* v. *Walls*[4] the duty to inform arose because the trustees had not got the money in their hands; Lord Cranworth L.C.[5] prefaced his observation that it was the duty of the trustees to explain by the words "but not having it"—the money—"in their hands." That case is no authority for the proposition that in the normal case where trustees hold the trust funds there is a duty to inform; their position in regard to a beneficiary is similar to that of an executor in regard to a legatee. An executor is a trustee, yet there is no obligation on him to inform a legatee of a legacy: *In re Lewis*[6]; *In re Mackay*.[7] See also *Low* v. *Bouverie*,[8] in particular the observations of Lindley L.J.[9] on the duties of a trustee. [Reference was also made to *Lloyd* v. *Attwood*.[10]]

[HAVERS J. A will is a public document which can be inspected by anyone.]

Section 68 (17) of the Trustee Act, 1925, equates a trustee to a personal representative for the purposes of the Act. *In re Mackay*[11] is also concerned with an executor, but the decision shows that there is no duty to disclose or to explain to beneficiaries their legal rights. [Reference was also made to *Brittlebank* v. *Goodwin*.[12]] If trustees were bound to volunteer

[3] (1870) 40 L.J.Ch. 28.
[4] 5 De G.M. & G. 233.
[5] Ibid. 253.
[6] [1904] 2 Ch. 656.
[7] [1906] 1 Ch. 25.
[8] [1891] 3 Ch. 82; 7 T.L.R. 582.
[9] Ibid. 99.
[10] (1859) 3 De G. & J. 614.
[11] [1906] 1 Ch. 25.
[12] (1868) L.R. 5 Eq. 545.

information to a beneficiary, it would follow that they would be bound to seek him out and, if necessary, make inquiries as to his whereabouts or even existence; since trustees are under no duty to give information to a beneficiary upon request unless they are indemnified against their proper costs in so doing, they cannot be under a duty to incur costs in order to seek him out so that they may volunteer information. It might be open to doubt whether a particular person was entitled under the trust; would trustees in such a case be under a duty to give information, and if so, how much?

[HAVERS J. There can be no duty to give legal advice.]

The only duty of trustees is to pay capital to a cestui que trust on demand. Here there was no demand. If there is a duty to pay capital without any demand, it must be a duty only to pay within a reasonable time. There were, therefore, no breaches of trust, or, at the most, the only breach of trust was the failure to pay the income to the plaintiff from February, 1939, to March, 1942.

*Frank Whitworth* and *C. E. Watson-Taylor* (*H. V. Lloyd-Jones Q.C.* with them) for the second, third and fourth defendants. The submissions of law made on behalf of the first defendant are adopted. There is no higher duty on a trustee to inform a beneficiary of his rights than there is on an executor to inform a legatee. *In re Lewis* [13] and *In re Mackay* [14] are relied on, and it is significant that those two cases are much later in date than *Burrows* v. *Walls*.[15]

In the absence of a demand there was no duty to pay the income to the plaintiff when he attained the age of 21. The only duty was to stand possessed of the income and trust funds until demand; compare the words " to the use of " used in conveyances of land on trust. It would be an impossible situation if there was an immediate necessity to hand over trust funds upon a beneficiary becoming entitled; in such a case a trustee might have to pay over at one minute past midnight on a certain day, or at least on the very day that a beneficiary came of age, or else pay the funds as speedily into court.

The plaintiff was not entitled to the income from his share of the trust fund before severance. *Walmsley* v. *Foxhall* [16] is not noted in Lewin on Trusts, nor in Underhill's Law relating to Trusts and Trustees, nor in Godefroi on Trusts and Trustees. Whether it is sufficient authority for the plaintiff's proposition is doubtful, but in any case it has no application to the facts of this case. [Reference was made to *Firmin* v. *Pulham*.[17]]

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[13] [1904] 2 Ch. 656.

[14] [1906] 1 Ch. 25.

[15] 5 De G.M. & G. 233.

[16] 40 L.J.Ch. 28.

If necessary, relief under the Trustee Act, 1925, is asked for.

*R. J. Parker* in reply. The position as to income on the vesting of the interest in capital of one joint tenant is that there is either an automatic severance on the vesting, or an automatic severance when the income accrues due; if the latter, *Walmsley* v. *Foxhall*[18] applies. Section 31 of the Trustee Act, 1925, does not provide for or indicate a contrary result, because section 31 (1) (i) gives power prior to majority to pay income towards maintenance, and section 31 (1) (ii) directs payment to a beneficiary on attaining 21 if the interest is not vested; a cestui que trust cannot have any less right to the income when his interest is vested than when it is not. The section impliedly recognizes the right to the income when the interest is vested. Section 31 (2) deals with the balance left after the operation of section 31 (1) and shows that on the attainment of a vested interest the beneficiary is entitled to the income: see *Stanley* v. *Inland Revenue Commissioners*.[19] [Reference was also made to *Williams* v. *Hensman*.[20]] On attaining majority, therefore, the plaintiff was entitled to the capital on severance and to the income from his share without any further act.

Trustees have a duty to inform a beneficiary not only of the existence of the trust but also of his rights under it. In *Burrows* v. *Walls*[21] Lord Cranworth L.C.[22] said in terms that there was a duty to inform; it is true that the juxtaposition of words suggests that the trustees' duty was linked with the fact that they had not the money in their hands, but that is coincidence and does not affect the generality of Lord Cranworth's observation. In *Brittlebank* v. *Goodwin*,[23] where the person concerned, although an executor, was also held to be a trustee qua the bond, Giffard V.-C.[24] specifically stated that there was a duty to inform. Neither *In re Lewis*,[25] which was solely concerned with executors, nor *In re Mackay*,[26] where the plaintiff had been aware of her rights under the will, modify or in any way affect the decision in *Burrows* v. *Walls*.[27] A trustee is bound to administer the trust and must ensure that the beneficiary has that to which he is entitled; in the case of a joint tenancy that includes the chance, on attaining the age of 21, of having the opportunity to sever. If it is the duty of trustees to put into the beneficiary's hands everything to which he is entitled, they must tell him of his right to sever. In *In re McCallum* [28] it was held that it was fraudulent not to inform, and the principle that there is such a duty was also recognized in *In re Emmet's Estate*,[29] where Hall V.-C. said [30]: "After a child attains 21 there is no duty undischarged, "except to hand over to the child the fund with the accumulations. The trustee did not so hand it over, nor did he explain "to the child that he was entitled to call for and have transferred "to him the fund . . ." It is also plain from *In re Emmet's Estate* [31] that there is a duty to pay both capital and income without any demand at all. Lindley L.J. in *Low* v. *Bouverie* [32] did not say that the duty to pay was contingent on a demand. Trustees must either pay or explain; where there is a contingent right to have capital transferred there is no need to wait for a demand: *Wroe* v. *Seed*.[33]

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[17] (1848) 2 De G. & Sm. 99.

[18] 40 L.J.Ch. 28.

[19] [1944] 1 All E.R. 230.

[20] (1861) 1 J. & H. 546.

[21] 5 De G.M. & G. 233.

[22] Ibid. 253.

[23] L.R. 5 Eq. 545.

[24] Ibid. 550.

[25] [1904] 2 Ch. 656.

[26] [1906] 1 Ch. 25.

[27] 5 De G.M. & G. 233.

*Cur. adv. vult.*

The following is an extract from the first part of the judgment read by HAVERS J. on October 5 and 6:

The Musgrave settlement dated June 19, 1893, was made by Thomas Hawkesley (great-grandfather of the plaintiff) upon his daughter, Mrs. Florence Musgrave, and in the events which happened after her death upon trust for the issue of Charles Hawkesley (grandfather of the plaintiff) as Mrs. Musgrave should appoint. By her will dated June 10, 1927, Mrs. Musgrave appointed to her great-nephew and great-niece, Harry Stephen Ronald Hawkesley, the plaintiff, and Cicely Winifred Hawkesley, such trust funds as she was compelled to leave back into the family. Mrs. Musgrave died on December 8,. 1930. Upon the hearing of an originating summons in the Chancery Division on February 15, 1934, the court declared [1] that the special power of appointment given to Mrs. Musgrave by the Musgrave settlement was effectually exercised by her will and that the plaintiff and his sister took an absolute interest in the property subject to that power immediately upon the death of Mrs. Musgrave, and that the husband of Mrs. Musgrave did not take a life interest therein.

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[28] [1901] 1 Ch. 143.

[29] (1881) 17 Ch.D. 142.

[30] Ibid. 149.

[31] 17 Ch.D. 142.

[32] [1891] 3 Ch. 82, 99.

[33] (1863) 4 Giff. 425.

[1] *In re Hawksley's Settlement* [1934] Ch. 384, 401; 50 T.L.R. 231.

An opinion of Mr. Danckwerts was taken in 1934 by the trustees upon the question whether the plaintiff and his sister took as joint tenants, and Mr. Danckwerts expressed the opinion that they did. Before me it was accepted by all parties as correct.

The joint tenancy was capable of being severed by the plaintiff on attaining the age of 21. There are a number of ways by which a joint tenancy may be severed. In *Williams* v. *Hensman*[2] Page Wood V.-C., in the course of his judgment, said[3]: "A joint-tenancy may be severed in three ways: in the "first place, an act of any one of the persons interested "operating upon his own share may create a severance as to "that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place "of the share which is claimed under the jus accrescendi. Each "one is at liberty to dispose of his own interest in such manner "as to sever it from the joint fund—losing, of course, at the "same time, his own right of survivorship. Secondly, a joint-"tenancy may be severed by mutual agreement. And, in the "third place, there may be a severance by any course of dealing "sufficient to intimate that the interests of all were mutually "treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express "act of severance, it will not suffice to rely on an intention, with "respect to the particular share, declared only behind the backs "of the other persons interested."

The first method indicated, namely, an act of any one of the persons interested operating upon his own share, obviously includes a declaration of intention to sever by one party. The position, therefore, of the plaintiff and his sister as joint tenants under the Musgrave settlement, was this: the right of each of them was a right by survivorship only in the event of the severance not having taken place. As to capital, the plaintiff on attaining 21 was entitled to sever by one of the methods I have indicated and to be paid his share. If the plaintiff did not exercise this right before his sister attained 21, then on his sister attaining 21 each had a right to sever. If, then, there had been no severance, on the sister attaining 21 the plaintiff and his sister were entitled to have the trust funds transferred to them jointly. As to income, there has been some controversy as to the true position in law. I was told by counsel engaged in this case that they had made an exhaustive search for authority, but there seemed to be, as it turned out, some curious dearth of authority upon this subject. Only one case was cited to me, that of *Walmsley* v. *Foxhall.*[4] The very short report reads: "Joint tenancy—Income—Right of Survivors. A joint "tenancy in income is severed as to each instalment as it "becomes payable, without actual payment. A fund was settled "upon trust to pay the income thereof to a number of infants "during their joint lives. During their infancies the income for "many years was accumulated. One of them having died, the "question was raised whether his personal representative was "entitled to a share of the accumulations or whether the whole "belonged to the survivors. Mr. Nalder submitted the question, "and that the infants were joint tenants of the income, and "there had been no severance. Mr. Cates appeared to support "the contrary view but was not heard. The Master of the Rolls "was clearly of opinion that as soon as any part of the income "became payable, the joint tenancy in that part was severed, "and consequently that the personal representative of the "deceased was entitled to a share of the accumulations."

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[2] (1861) 1 J. & H. 546.

[3] Ibid. 557.

This being the state of the authorities, I hold that on the plaintiff attaining the age of 21 he was entitled to the income of his share of the fund. As regards the severance, I hold that when the sister wrote the letter dated March 18, 1942, in which she said: "Thank you for your letter of 17th instant with the "particulars of the investments. I should like the dividends to "be paid into my account at Martins Bank, 208, Kensington "High Street" (which was a letter in reply to the first defendant), that was a sufficient act on her part to constitute a severance of the joint tenancy. If I am wrong about that, there clearly was a severance when her share of the trust funds were transferred to her in September, 1942.

Some argument was addressed to me upon the question whether or not the plaintiff was entitled to income on attaining 21. I can see nothing in section 31 of the Trustee Act, 1925, which lays down, or by inference indicates, that the trustees ought not to pay income to the plaintiff on attaining 21, or the capital to him and his sister on both attaining 21.

There has been acute controversy between the parties as to the duties which the defendants Tidy and Collins as trustees of the Musgrave settlement owed to the plaintiff as the cestui que trust. I regret that these questions, which are peculiarly within the province of the Chancery Division, should fall to be determined by me, especially as I am told by counsel who have made an exhaustive search that there is a lack of authority upon some of them. The plaintiff contends that it was the duty of the trustees (1) to disclose to the plaintiff on attaining 21 that he had an interest in the capital and income of the trust funds; (2) to disclose to the plaintiff on attaining 21 that he had a legal right to sever the joint tenancy; (3) to pay to the plaintiff interest on his share of the trust funds on attaining 21 whether demanded by him or not; (4) to pay to the plaintiff on severance of the joint tenancy his share of the capital of the trust funds whether demanded or not. The defendant May challenges (1), (2) and (4). He concedes that the plaintiff was entitled to income of his share on attaining 21, but contends that the trustees were only bound to pay it to him on demand. The defendants Tidy and Collins challenge (1), (2), (3) and (4).

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[4] (1870) 40 L.J.Ch. 28.

Upon these questions my attention has been drawn to a number of authorities and to passages in the leading textbooks. I was referred to Halsbury's Laws of England, 2nd ed. (1939), vol. 33, p. 229, para. 410. The paragraph concerned is in regard to the duties of a trustee with regard to keeping an account, and it says: " He "—that is the trustee—" is also bound to allow a " cestui que trust to inspect the trust accounts and all documents relating to the trust, and ought to explain to the cestui " que trust what his rights are." That is the passage relied upon, and the authority which is cited in Halsbury's Laws of England in support of that passage is *Burrows* v. *Walls*.[5]

There is also this passage in Godefroi on Trusts and Trustees, 5th ed. (1927), p. 527: " It is, moreover, incumbent upon trustees " to acquaint persons who have just attained majority of their " rights "; and *Burrows* v. *Walls* [5] is again cited as authority for that.

The passage in *Burrows* v. *Walls* [5] to which my attention was directed appears in the judgment of Lord Cranworth L.C.[6]: " I do not, therefore, proceed on a doubt that such an arrangement was entered into; but the question is, whether that " arrangement so entered into, which, if it had been by persons " entirely sui juris, cognisant of their rights, and who had not " the protection of infancy continued after majority, would " undoubtedly have absolved the other debtors (whether principals or sureties is immaterial), can, under the particular " circumstances of this case, have any binding operation whatever in favour of these trustees? I am of opinion that it " cannot, and for this reason—it is perfectly obvious on the face

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[5] (1855) 5 De G.M. & G. 233.

[6] Ibid. 253.

"of all the documents, that all the children, as they successively "came of age, were entirely ignorant that they had any rights "against any person except Newsham." This passage was also relied upon[7]: "It was undoubtedly the duty of the three "trustees to have had the money in their hands, but not having "it in their hands to have explained to the infants as they came "of age what their rights were. They not only did not do that, "but the correspondence which takes place afterwards—I will "not say necessarily leads the cestuis que trust to suppose but "fortifies them in the supposition which they must have entertained, that they had no claim except against Newsham." It has to be borne in mind that the court there was considering the question whether there had been acquiescence on the part of the cestui que trust, and I think the words which I have already read are significant: "It was undoubtedly the duty of the three "trustees to have had the money in their hands, but not having "it in their hands to have explained to the infants as they came "of age what their rights were."

I was also referred to *Brittlebank* v. *Goodwin*.[8] In that case Giffard V.-C. said[9]: "It is plain that Sarah Goodwin was a "trustee of John Brittlebank's bond, and that on her death her "administrator became a trustee just as much as Sarah "Goodwin was, for Ann Brittlebank did not die till September, "1836, a period of eighteen years or nearly so after the death "of her mother. Until her death nothing was or could be payable to the person or persons legally entitled to take out "administration to her. It is, I think, questionable whether it "was intended by the will to interpose any person who was not "one of the next of kin in a due course of administration, as a "person entitled to receive the £5,000. Assume, however, that "it was—and assume that administration had been taken out, "which does not appear to be the case. This would have "afforded no defence at law to an action on the bond, and most "assuredly no suit in equity for the purpose of an injunction "could for one moment have been maintained except on the "terms of John Brittlebank paying the £5,000 and interest into "court. The legal interest in the bond after the death of Sarah "Goodwin was in her administrator. I am satisfied from the "evidence that George Goodwin the younger knew all the facts "with reference to the breach of trust and bond. Neither Sarah "Goodwin nor he could ever have been heard to say that they

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[7] 5 De G.M. & G. 233, 253.

[8] (1868) L.R. 5 Eq. 545.

[9] Ibid. 550.

"were not trustees of the bond, or that they had not, as such "trustees, duties to perform towards their cestui que trust. One "of those duties most unquestionably was to put the bond in "suit, that is, if by so doing payment of any part of it could "have been obtained. Another duty was to have informed the "persons interested, when they attained 21, of the position of "the fund and of their rights. This was not done, nor was the "bond put in suit;".

On the other hand, I was referred to *In re Lewis*,[10] the head-note of which reads [10]: "Where a legacy is given upon a "condition, an executor who takes a beneficial interest in the "legacy on the breach of the condition owes no duty to the "legatee to give notice of the terms of the legacy. Dictum of "Lord Hardwicke in *Chauncy* v. *Graydon* [11] considered. A testa-"trix appointed her son A. her executor and bequeathed a "leasehold house to her son B., then abroad, and directed that "in case he should not return and claim it it should go to A. "After the death of the testatrix, A. wrote to B.: 'A house has "'been left you and according to the will it is to be in my hands "'until you claim it'; but he did not inform him of the gift "over. B. died abroad without having claimed the house:— "Held" (by the Court of Appeal) "that A. was not estopped by "the letter from claiming under the gift over, because (1) there "was no sufficiently precise representation that B. was absolutely "entitled; (2) it was not proved that the non-return of B. was "the consequence of the representation." Vaughan Williams L.J. said [12]: "This is a very hard case; but one must not because "it is a hard case lay down principles which are not in accordance "with the law. Mr. Rowlands has argued this case with a full "recognition on his part of the real difficulties which lay in his "way, which in my opinion is the best form of advocacy. He "had to start with this admission—that prima facie there was no "duty on the executor to disclose; and then he had also to admit "that the mere fact that Evan Lewis had no notice of this "provision in the bequest of the leasehold house to himself would "not of itself have relieved him of the consequence, to use the "very words of the will, of his not having returned from abroad "and claimed the said house. . . . We have got thus far—that "there is no duty on the executor to disclose, and that prima "facie, inasmuch as Evan Lewis never did, and now never can, "return from abroad and claim the house, his administrator

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[10] [1904] 2 Ch. 656.

[11] (1743) 2 Atk. 616, 619.

[12] [1904] 2 Ch. 656, 661.

"cannot successfully claim it unless there is something else to "assist. It is said, however, that, though generally there is no "duty on the executor, yet in this particular case there is a duty, "because by reason of the gift over the executor will get an "advantage; and for that proposition reliance is placed upon an "observation of Lord Hardwicke. . . ." Vaughan Williams L.J. continued [13]: "It is said of that passage that, although it "assumes that generally there is no duty on the executor to give "notice, it puts an exception to that rule where a testator has by "the terms of his will laid an obligation upon the executor, or "where the executor takes some beneficial interest. If one were "sure that Lord Hardwicke intended to decide anything of the "sort, one would give further consideration to the contention "founded on that passage. But the question which we have to "decide was not raised in that case, and there was no argument "based on the assumption that an executor who took a beneficial "interest had a special obligation to give notice. That being so, "it seems to me we must start with the assumption that there is "no duty to give notice imposed on the executor either by the "general law or by the special provisions of the will."

Romer L.J. said [14]: "It is clear that if the executor in this "case had not also been the person entitled under the gift over "it could not have been contended since *Chauncy* v. *Graydon* [15] "that there was any such duty cast upon him. It is also clear "that if the defendant had not been the executor it could not "have been said that there was any duty cast upon him in his "position of devisee under the gift over. That being so, it is "difficult to see how you can imply a duty because these two "positions coalesce when neither of the positions involves such "duty. I cannot see any sufficient reason for holding that such "a duty is cast on the defendant as is contended for here, and, "unless the exigencies of the case require it, I think that we "ought not to imply a duty not recognized by the law as it stands. "There is no authority for implying such a duty, and there would "be great difficulty in considering what kind of duty could be "implied. It could not be said that there was an absolute duty. "The appellant's counsel naturally shrank from so contending. "It could not be said, for example, that there was any duty cast "on an executor in a case where he did not know and could not "find out where the legatee was living. If the court cannot "imply an absolute duty, it is difficult to see in what case it can

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[13] [1904] 2 Ch. 656, 662.

[14] Ibid. 663.

[15] 2 Atk. 616.

"imply a duty. But it was said that there was a duty to take "reasonable care. Reasonable with regard to what? It must "be reasonable, I suppose, having regard not only to the position "of the absent legatee, but to the position of the executor. "I should think that the difficulties in the way of the court "implying such a duty as is contended for are such that certainly "the court ought not to imply a duty unless bound to do so by "authority—and there is no such authority. I think, therefore, "that the main contention urged on the part of the appellant "entirely fails."

Cozens-Hardy L.J. agreed and went on to say[16]: "That "being so, we start with this—that it is plain there is no prima "facie duty resting on an executor to give notice. But it is said "that although that is so, there is an exception in the case of an "executor having himself an interest in the legacy. For that "there is no trace of authority in the way of decision, and no "trace of an opinion by any text-writer. There is nothing but "the passage in Lord Hardwicke's judgment which the industry "of counsel has succeeded in unearthing. I do not regard that "as anything more than the sort of observation which a judge "might make upon a point which was not argued before him and "which did not arise in the case. There is no suggestion that it "did. I cannot regard that as making an exception to the "general rule as to the necessity of communicating."

That case was followed by *In re Mackay*,[17] the headnote of which states: "A testator bequeathed all his property to his "wife and children, and appointed his wife sole executrix. He "left him surviving his wife and two infant children, viz., a "son, long since deceased, and a daughter, who attained 21 in "1876. The widow married again, and during her daughter's "infancy she, in her character of executrix, advanced all the "testator's estate to her second husband upon the security of a "mortgage which proved insufficient. She survived her second "husband, and died in 1885, having left all her property away "from her daughter. The daughter, as sole surviving beneficiary "under her father's will, claimed the whole of her mother's "estate, upon the ground that it represented moneys retained "by her mother under an order of the court in part satisfaction "of the mortgage, and in 1903 she commenced an action against "her mother's executors for an account on this footing:—Held, "that the mother was not an express trustee of these moneys "for the plaintiff, that this was an action to recover a legacy

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[16] [1904] 2 Ch. 656, 664.

[17] [1906] 1 Ch. 25.

"within section 8 of the Real Property Limitation Act, 1874, "and that the claim was statute-barred. Whether the mother "was under any legal obligation to inform her daughter upon "attaining 21 of the benefit conferred on her under her father's "will, quaere."

Kekewich J.[18] says: "But then it is said in answer to that "that she had a duty to disclose to her children upon their "attaining their majority their rights under the will. For that a "passage is cited from the judgment of Giffard V.-C. in *Brittlebank* v. *Goodwin.*[19] I do not propose to go into that case fully, "and therefore I will merely read the passage which has been "cited, and which, strange to say, seems to have escaped the "notice of counsel and of the court in another case to be mentioned presently, in which it would have been particularly "apposite. The Vice-Chancellor, speaking of an administrator "of an executor, said[20]: 'Another duty was to have informed "'the persons interested, when they attained 21, of the position "'of the fund and of their rights.' It may be that at some "future date it will be necessary to examine those words more "closely in order to ascertain exactly what the Vice-Chancellor "meant, and how far his language ought to be taken literally "and applied to a case such as that with which we are now "dealing, but for the moment I do not think that is necessary. "But before I give my reasons for so thinking let me look at "the case of *In re Lewis*,[21] where it was said, apparently, that "there was no such duty. There Vaughan Williams L.J., in "giving judgment, referring to certain necessary admissions "made by the plaintiff's counsel in the course of the argument, "said[22]: 'He had to start with this admission—that prima "'facie there was no duty on the executor to disclose'; and I "observe that that was concurred in by the other Lords Justices. "Thus, Cozens-Hardy L.J. says[23]: 'We start with this—that "'it is plain there is no prima facie duty resting on an executor "'to give notice.' That is, to give notice of the rights of those "who could make claims against them. Having regard to that "decision, it is a question whether the language of the Vice-Chancellor, which deserves the most respectful consideration, "may not require to be examined more closely hereafter. I see "very great difficulty in saying that an executor is bound to give "notice to a legatee or to anyone else who is entitled to claim

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[18] [1906] 1 Ch. 25, 32.

[19] L.R. 5 Eq. 545.

[20] Ibid. 550.

[21] [1904] 2 Ch. 656.

[22] Ibid. 661.

[23] Ibid. 664.

"against the estate of the benefits conferred upon him by the "will—I mean bound in the sense that any consequences follow "from his not performing the obligation. Bound in one sense "he may be. There may be an imperfect obligation to disclose, "but a perfect obligation, i.e., an obligation to which a sanction "is attached, seems to me to be very difficult to hold. But it is "not necessary to go into that, because I have held that the "plaintiff knew her claims under her father's will perfectly well "throughout. It is quite possible that she did not know whether "she was a joint tenant or a tenant in common, but it could not "have been the duty of the executrix to explain the law to her. "All the duty that could have been put upon the mother was to "say: there is your father's will, under which you take an "interest, and what that interest is your lawyer will explain to "you. I have not the slightest doubt that the mother did tell "her. She could not have known it from any other source. "Therefore, if there was any duty cast upon the mother, that "duty has been performed."

I may mention also the judgment of the Court of Appeal in *Low* v. *Bouverie.*[24] The headnote is: "Although it is "the duty of a trustee to give his cestui que trust, on demand, "information with respect to the dealings with and position "of the trust fund, it is no part of his duty to assist his cestui "que trust in selling or incumbering his beneficial interest "by telling him what incumbrances he, the cestui que trust, "has created, nor which of his incumbrancers have given notice "of their respective charges; and it follows that the trustee is "under no obligation to answer the inquiries of a stranger about "to deal with the cestui que trust."

Lindley L.J., at the beginning of his judgment, said [25]: "The "duty of a trustee is properly to preserve the trust fund, to pay "the income and the corpus to those who are entitled to them "respectively, and to give all his cestuis que trust, on demand, "information with respect to the mode in which the trust fund "has been dealt with, and where it is. But it is no part of the "duty of a trustee to tell his cestui que trust what incumbrances "the latter has created, nor which of his incumbrancers have "given notice of their respective charges. It is no part of the "duty of a trustee to assist his cestui que trust in selling or "mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes

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[24] [1891] 3 Ch. 82; 7 T.L.R. 582.

[25] [1891] 3 Ch. 82, 99.

"to buy or lend money on it has no greater rights than the "cestui que trust himself."

Another case to which I was referred was *Lloyd* v. *Attwood.*[26] It is to be observed that the court was there considering the validity or invalidity of a release. In the course of his judgment Turner L.J. said[27]: "The principles by which we are to be "guided in determining on the validity or invalidity of these "releases admit of no doubt. Cestuis que trust cannot be bound "by releases given to their trustees, if given in ignorance of their "rights, for it is the duty of the trustees to apprise them of those "rights."

So far as an executor is concerned, I am bound by the decision of the Court of Appeal in *In re Lewis*[28] to hold that there is no legal duty upon him to give notice of the terms of the legacy to the legatee. I see no reason, however, to extend this doctrine, which has no attraction for me on the merits, to a trustee under an express trust. The position of an executor and a trustee, although now, for many purposes, assimilated under the Law of Property Act, 1925, is still not identical, and there is a distinction between a will, which is a public document in the sense that anybody can go to Somerset House and see it, and a trust deed, which is a private document to which the cestui que trust has no access. In the absence of any authority to the contrary I decline to extend this doctrine to trustees under an express trust.

I hold, therefore, that there was a duty upon the defendants Tidy and Collins, as trustees of the Musgrave settlement, to inform the plaintiff on attaining 21 that he had an interest in the capital and income of the trust funds of the Musgrave settlement. A fortiori, if the trustees did not hand over to the plaintiff on attaining 21 income to which he was entitled, it would be their duty to explain to him that he was entitled to call for and have the interest paid to him. The authority which was cited to me in support of that proposition was *In re Emmet's Estate*[29]—the remarks of Hall V.-C.[30] in particular.

As to the second question, the authorities which were relied upon in support of the proposition of the plaintiff that it was the duty of the trustees to inform him upon attaining the age of 21 that he had a legal right to sever, seemed to me to be cases in which the trustees had parted with the trust funds and the court was considering whether a cestui que trust had precluded himself from his remedy against his trustees by acquiescence or release. Different considerations apply where a court is considering problems of that character; Lewin on The Law of Trusts, 15th ed. (1950), p. 769, makes this clear: "Acquiescence, release and confirmation, to have the effect we "have mentioned, must be understood to be accompanied with "the following conditions:—As in the case of concurrence, the "cestui que trust must be sui juris, and not a married woman or "infant; as regards infants, the court continues its protection "even after they have attained 21, till such time as they have "acquired all proper information, and infants on coming of age "must, in the case of a formal release being executed by them, "where it is required have *proper legal advice*. A married woman "is clearly sui juris with regard to her own property where there "is no restraint against anticipation, and her covenant not to "sue may, in some cases, have the effect of a release. But "where a married woman was entitled to separate estate with "a clause against anticipation, it is difficult to see how she could "be affected by acquiescence. In a case in 1853 (*Derbishire* "v. *Home*),[31] however, Turner L.J. intimated his leaning to "be in favour of the affirmative, but the language of Knight-"Bruce L.J., in the case alluded to, was more guarded. The "restraint on anticipation could impose no fetter as respects "*income accrued due before the acts of acquiescence* relied upon. "If a suit be instituted for relief against a breach of trust, the "*court* has jurisdiction to sanction a compromise on behalf of a "married woman even though her interest be reversionary. The "*cestui que trust* must be fully cognizant of all the facts and "circumstances of the case; and if the release is executed by "the *cestui que trust* in ignorance of his rights, it may be set "aside after the death of the trustee, and after a long interval, "as, for instance, 20 years. The *cestui que trust* must not "only be acquainted with the *facts*, but also to a certain extent "apprised of the *law*, or how those facts will be dealt with if "brought before a court of equity."

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[26] (1859) 3 De G. & J. 614.

[27] Ibid. 649.

[28] [1904] 2 Ch. 656.

[29] (1881) 17 Ch.D. 142.

[30] Ibid. 149.

Upon the second question, I hold that there was no duty on the trustees to give the plaintiff legal advice or to inform him of his right to *sever*, though they would be bound, in my opinion, to disclose on demand any document relating to the trust, including the opinion of Mr. Danckwerts.

As to the third question, no authority was cited to me by any of the defendants in support of their proposition that the obligation on the trustees was to pay income, if income was payable to the plaintiff on attaining 21 (as I hold it was), only on demand. It seems to me that the passage which I have cited in *Low* v. *Bouverie*[32] is contrary to that view, and no authority has been cited in support of the defendants' proposition.

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[31] (1853) 3 De G.M. & G. 80.

My attention was called to *Wroe* v. *Seed*,[33] the headnote of which reads: "Executors and devisees in trust to sell, having "an option of postponing the sale for five years were directed "in such case to pay the income to the tenant for life. At the "end of five years, they had paid no legacies, rendered no "account, though frequently requested so to do, nor dealt with "the estate, but claimed remuneration for their services." In giving judgment Stuart V.-C. said[34]: "Here were executors "with a very large estate; £11,000 of it is said to have been in "advance, ready to be distributed at the death of the testator. "What conduct can be more grossly improper than that of "executors, who were to pay legacies and to distribute the "residue, with a direction to pay the income of the residue "immediately, but who did not pay the income; who can suggest "no difficulty as to knowing who the legatees were; who, for five "years after the testator's death left legacies unpaid, the residue "almost wholly undealt with, no account ready that can be "produced, and no account taken until this bill is filed; and "who, when this bill is filed, bring forward demands against the "estate on their own behalf which the court has found it to be "its duty wholly to disallow. The questions to be disposed of "with regard to them now are, the question of the costs of this "litigation, and that of the interest on their balances. One part "of the conduct of these executors, which their counsel has "endeavoured to show was laudable and discreet, was, that each "of them took £1,000 to his own house. One of them says he "kept this sum in gold, and applied it for no purpose. They say "that they kept these sums for the purpose of paying legatees if "they should expectedly or unexpectedly come to demand any "money. That is gross misconduct. It is highly culpable "and gross misconduct for any executor who has a legacy "immediately payable to take into his own house money for the "purpose of paying it, and to keep it five years, there being no "difficulty in ascertaining who the legatee is, and producing it "only in consequence of a decree made against him by this "court."

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[32] [1891] 3 Ch. 82, 99.

[33] (1863) 4 Giff. 425.

[34] Ibid. 429.

I do not accept the defendants' contention upon this question. I hold that it was the duty of the trustees to pay the income of his share to the plaintiff on attaining the age of 21 without any demand by him; and also to pay the capital to the plaintiff and his sister as joint tenants upon the sister attaining 21 without any demand by them, or after severance of their respective shares to each of them without any demand.

[His Lordship then reviewed the evidence and the correspondence, on which the allegations of conspiracy and fraud mainly turned, and having considered those issues, found that they were without foundation. His Lordship found, further, that the breaches of trust committed by the defendants Tidy and Collins were not fraudulent and that neither the defendant Tidy nor the defendant Collins had been a party or privy to any fraud or fraudulent breach of trust, and he held, therefore, that section 19 (1) of the Limitation Act, 1939, did not apply and that the plaintiff's claim in respect of breaches of trust was barred by section 19 (2) of the Limitation Act, 1939. His Lordship added that had it been necessary he would have wholly relieved the trustees of liability under section 61 of the Trustee Act, 1925, as they had acted throughout reasonably and honestly and ought fairly to be excused.]

*Judgment for the defendants.*

Solicitors: *Ward, Bowie & Co.; May, May & Deacon; Tucker, Hussey & Clare.*

J. F. L.

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## LOWER v. PORTER.

C. A.

1955
*Dec. 9.*

Denning, Hodson and Morris L.JJ.

*Landlord and Tenant—Rent restriction—Premium—Lease of dwelling-house within Rent Acts—Dwelling-house converted by lessee into two self-contained flats—Tenancy of converted dwelling-house assigned to plaintiff—Premium taken—Tenancy within Rent Acts despite conversion into two separate dwelling-houses—Premium recoverable by plaintiff—Landlord and Tenant (Rent Control) Act,* 1949 (12, 13 & 14 *Geo.* 6, *c.* 40), *s.* 2 (3).

Section 2 of the Landlord and Tenant (Rent Control) Act, 1949, which prohibits the payment of a premium as a condition of the assignment of a tenancy to which the Rent Acts apply, provides by subsection (3): "This section applies to any tenancy of a dwelling-"house, being a tenancy to which the principal Acts apply, such "that when the dwelling-house is let under the tenancy it is a "dwelling-house to which the principal Acts apply."

The lessee of a dwelling-house to which the Rent Acts applied converted it into two self-contained flats at a cost of £280, and assigned the remainder of his lease to the plaintiff, who paid him £600, and, after entering into possession, claimed the return of that sum as an unlawful premium:—

*Held*, that the plaintiff was entitled to recover as an unlawful premium the amount paid, less the £280 expended on the structural alteration, since the words of subsection (3) were apt to cover a tenancy of a dwelling-house to which the Rent Acts applied, despite the fact that at the date of the assignment of the tenancy the dwelling-house had been converted into two separate dwelling-houses.

*Minns* v. *Moore* [1950] 1 K.B. 241; 65 T.L.R. 739; [1949] 2 All E.R. 800; *Langford Property Co. Ltd.* v. *Goldrich* [1949] 1 K.B. 511; [1949] 1 All E.R. 402; and *Whitty* v. *Scott-Russell* [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884 considered.

APPEAL from Judge Armstrong, sitting at Bournemouth County Court.

By a lease dated November 28, 1950, dwelling-house premises at 110, Southbourne Road, Bournemouth, were let by a Mrs. Falcon to the defendant, Walter Horace Porter, for a term of seven years, at a rent of £200 a year, with an option for renewal. The house was one to which the Rent Restrictions Acts applied. On the same day the landlord granted the defendant a licence to convert the premises into two self-contained flats. Subsequently that conversion was carried out by the defendant, such that the house was converted into two self-contained flats with separate entrances, kitchens, etc.

In October, 1954, the defendant assigned his lease to the plaintiff, Mrs. Celia Lower, the contract between the parties stating that the defendant assigned the house together with the goodwill of the business of a guest house carried on therein for the sum of £600, the whole of which sum was apportionable to the goodwill. No business of a guest house had been carried on therein and there was in fact no goodwill attaching. The plaintiff entered into occupation, and thereupon applied to the county court for the repayment of the £600, claiming that it was an unlawful premium prohibited by section 2 of the Landlord and Tenant (Rent Control) Act, 1949.[1]

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: "(2) Subject "to the provisions of Part II of the 'First Schedule to this Act, a person "shall not, as a condition of the "assignment of a tenancy to which "this section applies, require the pay- "ment of any premium. (3) This

On October 26, 1955, the county court judge found that the amount expended by the defendant on the conversion of the dwelling-house was £280, and held that that sum could be claimed by him under the terms of section 2 (4) (*b*) of the Act of 1949 [1] in respect of structural alterations and repairs, but that the remainder of the £600, namely, £320, was a premium for which there was no justification; and he accordingly ordered that that amount should be repaid to the plaintiff.

The defendant appealed.

*John Southam* and *Robert Hughes* for the defendant. Though it is conceded that before the dwelling-house was converted into two flats the principal Acts applied to it, at the date of the assignment of the lease in 1954—which is the important point of time for consideration—the Acts did not apply, for there was not then one dwelling-house, but two. The words in the second half of subsection (3) of section 2 of the Act of 1949, "such "that when the dwelling-house is let under the tenancy it is a "dwelling-house to which the principal Acts apply," would not be there if they were merely tautologous; they cannot widen the preceding words; therefore they limit them, and must be read as follows: "but only such that when the dwelling-house is let "under the tenancy it is and remains a single and separate "dwelling-house and one to which the principal Acts apply." The subsection cannot be given any sensible meaning if the rule that the singular shall include the plural is applied; it can only be construed if the words "a dwelling-house" are read in the singular where they last occur in the subsection. Both dwelling-houses taken separately come within the Acts; but the assignment of two dwelling-houses under the same tenancy is not covered on a straightforward reading of the Act. "When" in subsection (3)

"section applies to any tenancy of a "dwelling-house, being a tenancy to "which the principal Acts apply, such "that when the dwelling-house is let "under the tenancy it is a dwelling-"house to which the principal Acts "apply. (4) Notwithstanding any-"thing in subsection (2) of this sec-"tion, an assignor may, if apart from "this section he would be entitled so "to do, require the payment by the "assignee— . . . (*b*) of a sum not "exceeding the amount of any expen-"diture reasonably incurred by the "assignor in carrying out any struc-"tural alteration of the dwelling-"house or in providing or improving "fixtures therein, being fixtures "which as against the landlord he is "not entitled to remove; . . . (6) A "person requiring any premium in "contravention of this section shall "be liable on summary conviction to "a fine not exceeding one hundred "pounds, and the court by which he "is convicted may order the amount "of the premium, or so much thereof "as cannot lawfully be required "under this section, to be repaid to "the person by whom it was paid."

means "only so long as," so that if the dwelling-house ceases to be *a* dwelling-house and becomes two, it is outside the ambit of the section.

[DENNING L.J. Then Parliament by putting in these words has done something which they did not intend?]

That often happens in these Acts. It is submitted, alternatively, that the process of conversion changed the identity of the house and therefore the Acts no longer applied.

*June Verrall* for the plaintiff. The dwelling-house was at the time of the assignment one to which the Acts applied, and the £600 demanded as a condition of the assignment was as to £320 a premium recoverable under section 2. The intention of the Act was to make illegal the payment of premiums, and it is improbable that the legislature would in this roundabout way have excluded certain premises from its application. The first part of subsection (3) refers primarily to the tenancy, and the second half serves only to identify the dwelling-house. The first part of the subsection can stand without the second half under consideration.

[DENNING L.J. Then why has Parliament put in the second half?]

Parliament was dealing with the nature of the dwelling-house, namely, one which was let under a tenancy. The mere physical separation of the premises does not prevent its being a dwelling-house: see *Langford Property Co. Ltd.* v. *Goldrich* [2]; and *Whitty* v. *Scott-Russell*,[3] *per* Somervell L.J.[4] In *Whitty's* case it is conceded that the lease expressly specified the user, and the court decided that they need look no further than the lease; but where, as here, the user is not expressly specified in the lease, one can look at all the circumstances at the time of the original letting and deduce what user was contemplated. In *Whitty's* case [4] the original letting was of two entities capable of being separately lived in but expressly let as one dwelling-house. In the present case the premises were one entity and at the time of the original letting came within the Acts. One can therefore infer that the intention of the parties was that the premises should be used as *a* dwelling-house, and they were so let. The only way in which the defendant could prove that between the date of the original letting and the date of the assignment in 1954 he had shaken off the protection of the Rent Acts would be by showing that he had so changed the identity of the property as to take it outside the Acts. That is not the position here, for only £280 was spent on alterations, and in any event change of identity is a question of fact for the judge.

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[2] [1949] 1 K.B. 511; [1949] 1 All E.R. 402.

[3] [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884.

[4] [1950] 2 K.B. 32, 39–40.

In *Minns* v. *Moore* [5] it was held that where a dwelling-house had never been let before but had been occupied by the owner, the Rent Acts would apply to the first letting, and an excessive price for furniture was held to be recoverable under the Rent Act of 1923.

[DENNING L.J. It may be that the second half of subsection (3) was put into the Act of 1949 to cover that situation, for *Minns* v. *Moore* [5] had not been decided when the Act was passed. If it had been, those words might have been omitted.]

That is possible. The words are in any event not intended to limit "dwelling-house" in any way other than they were limited by previous Acts and decisions. [*Rider* v. *Rollit* [6] was also referred to.] The authorities show that it is possible for two flats to be let as a separate dwelling-house, and the premium was accordingly unlawful and is recoverable by the plaintiff.

*Southam* in reply. *Minns* v. *Moore* [7] is distinguishable, for there the point of time at which section 9 (1) of the Rent Act of 1923 came into operation was being considered from the point of view: "When did it begin?"; whereas now in the present subsection the question is: "When did it come to an end?" *Whitty* v. *Scott-Russell* [8] is distinguishable on its facts, for the lease expressly stipulated "separate dwelling-house" as the user for the whole premises, and the tenant could not go behind those words. In *Langford Property Co. Ltd.* v. *Goldrich*,[9] though the two halves of the tenant's holding were separated, the whole was still one holding; that is the opposite of the present case, for here what looks like one house is in fact two.

Finally, in view of the penal consequences of subsection (6) of section 2 the court should lean towards a construction of subsection (3) which favours the person who may be liable under the penal provision.

DENNING L.J. stated the facts and continued: Mr. Southam, for the defendant, argues that the Landlord and Tenant (Rent Control) Act, 1949, does not apply because the dwelling-house

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[5] [1950] 1 K.B. 241.
[6] (1920) 36 T.L.R. 687.
[7] [1950] 1 K.B. 241.
[8] [1950] 2 K.B. 32.
[9] [1949] 1 K.B. 511.

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was converted into two dwelling-houses. He refers to section 2 (3) of the Act, which provides: "This section applies to any "tenancy of a dwelling-house, being a tenancy to which the "principal Acts apply, such that when the dwelling-house is "let under the tenancy it is a dwelling-house to which the "principal Acts apply." Mr. Southam says that the relevant time for applying the second half of that subsection is the time of the assignment; and that at the time of the assignment here the dwelling-house was not "a dwelling-house" to which the principal Acts applied, but was two dwelling-houses. He says that the Act is not apt to cover such a situation and that, having penal consequences, it should be construed in favour of the defendant and not against him.

I am not able to accept that construction. It seems to me reasonably plain that the second half of that subsection is inserted simply to make sure that where the house has not been previously let there is to be no premium, not even on the first letting. Since the Act, the decision in *Minns* v. *Moore*[1] has shown that in any event that result would have been achieved without the added words; but I think that that is why Parliament added the words. It seems to me plain that the section covers a case like the present, because even though the house has been converted into two flats, if you ask yourself: Is it a dwelling-house to which the principal Acts apply? the answer is: Yes. Indeed, Miss Verrall drew our attention to *Langford Property Co. Ltd.* v. *Goldrich*[2] and *Whitty* v. *Scott-Russell*[3] where, despite the fact that two physically separate premises were comprised within the letting, nevertheless, it was held to be a letting of a dwelling-house to which the principal Acts applied.

In my judgment, the words in the second part of section 2 (3) were put in the statute by way of precaution and do not derogate from the effect of the first part, which provides that the section "applies to any tenancy of a dwelling-house, being a tenancy "to which the principal Acts apply." This was such a tenancy. The £600 was a premium, and it is recoverable by the plaintiff, subject to the credits allowed by the county court judge for the cost of work done, namely, £280. I think that the county court judge was right in his decision, and I would dismiss the appeal.

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[1] [1950] 1 K.B. 241; 65 T.L.R. 739; [1949] 2 All E.R. 800.

[2] [1949] 1 K.B. 511; [1949] 1 All E.R. 402.

[3] [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884.

Hodson L.J. I agree. Mr. Southam has contended that at the time of the assignment there was not one, but there were two dwelling-houses, and, therefore, by reason of the words of subsection (3) of section 2 of the Act of 1949 the county court judge must have been wrong in finding that the prohibition of premiums imposed by section 2 applied.

Section 2 (3) begins thus: "This section applies to any "tenancy of a dwelling-house, being a tenancy to which the "principal Acts apply." If the subsection had stopped there, Mr. Southam conceded that his argument would fall to the ground; but he relied on the remaining words of the subsection, which are: "such that when the dwelling-house is let under "the tenancy it is a dwelling-house to which the principal Acts "apply," and in particular on the word "when." Reading it in full, he contended that the effect of the second part of the subsection is this: that it should read "but only such that when the "dwelling-house is let under the tenancy it is and remains a "single and separate dwelling-house and one to which the prin-"cipal Acts apply." He said that this is not a single and separate dwelling-house, but is two dwelling-houses, and, therefore, it is outside the scope of the section; and he relies on the last part of the subsection as containing limiting words.

I think that that is a wrong way of reading the second part of the subsection. The word "when" should not, it seems to me, be construed, in its context, in a temporal sense; it is merely used to make the phrase equivalent to "in the case of a dwelling-"house if let under the tenancy," so as to identify the particular dwelling-house; that reading has the effect that the dwelling-house which has to be looked at is a dwelling-house the subject-matter of this tenancy; accordingly, the last phrase has no limiting effect on the subsection taken as a whole. I agree, therefore, that the appeal should be dismissed.

Morris L.J. There was a tenancy in this case which was assigned. Subsection (2) of section 2 of the Act of 1949 provides that "a person shall not, as a condition of the assignment of a "tenancy to which this section applies, require the payment of "any premium." At the time of this assignment a sum of £600 was paid. By contemporary documents it was made to appear that that £600 was in respect of the goodwill of the business of a guest house being carried on; but it is now common ground that there never was a guest house at all. As to £320 the payment was a premium not covered by subsection (4). So the prohibition

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imposed by subsection (2) that there shall not, as a condition of the assignment, be a premium applies if the assignment was of a tenancy to which the section applied.

The assignment was of the tenancy from Mrs. Falcon to the defendant. The question therefore arises whether that tenancy was a tenancy to which the section applied. In order to see that, we have to look at subsection (3). I think that Miss Verrall is right when she says that the first part of that subsection refers to the word "tenancy" and the second part refers to the word "dwelling-house." If one reads subsection (3) in reference to the facts of this case, the reading which results is as follows: "this section applies to the tenancy from Mrs. Falcon to Mr. "Porter of 110, Southbourne Road, if it is a tenancy to which "the principal Acts apply such that, when 110, Southbourne "Road is let under the tenancy from Mrs. Falcon to Mr. Porter, "110, Southbourne Road is a dwelling-house to which the principal Acts apply." It is not doubted that the principal Acts did apply to the tenancy to the defendant, and when No. 110 was let by Mrs. Falcon to the defendant it was a dwelling-house to which the Acts applied. It seems to me, therefore, that this was a tenancy to which the section applied.

I may add that it is made clear by the words of Somervell L.J. in *Langford Property Co. Ltd.* v. *Goldrich*[4] that there may be two houses that are let as one. Somervell L.J. there said[5]: "In my opinion, if the facts justify such a finding, two flats or, "indeed, so far as I can see, two houses, could be let as a separate "dwelling-house within the meaning of the definition." So that even if, in considering section 2 (3), the time of the assignment by the defendant is to be regarded, and not, as I think, the time of the letting from Mrs. Falcon to the defendant, 110, Southbourne Road could still be a dwelling-house. The assignment was of the tenancy of 110, Southbourne Road as a whole. I agree, therefore, that this appeal fails.

*Appeal dismissed.*

Solicitors: *Jaques & Co. for John W. Richardson, Christchurch, Hants; Vivash, Robinson & Co. for Harold G. Walker, Bournemouth.*

M. M. H.

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[4] [1949] 1 K.B. 511.

[5] Ibid. 517.

# NORTH RIVER FREIGHTERS LTD. *v.* H.E. PRESIDENT OF INDIA.

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*Nov.* 21, 22, 24;
*Dec.* 8.

**Singleton,** Jenkins and Parker L.JJ.

*Shipping — Charterparty — Demurrage — Lay time — Commencement—Ship to proceed to one safe berth Dairen—Whether port or berth charter—Lay time to commence 24 hours after notice of readiness to load—"Time lost in waiting for berth to count as "loading time"—Whether time so lost before notice of readiness counts.*

The plaintiffs' steamship *Radnor* was chartered by the President of India to proceed to "one safe berth Dairen (Manchuria)" and there load a full and complete cargo of soya beans for carriage to Madras and Calcutta. The charter contained (clause 17) the usual provision for lay days to commence 24 hours after notice of readiness to load had been given by the master. It also contained in clause 5 the following provision: "Time lost in waiting for berth to count "as loading time."

The *Radnor* arrived at Dairen on the early morning of June 3, 1951, and came to anchor in the quarantine anchorage, where she was boarded by customs and port officials, who sealed up her radio, took away a number of ship's documents, and banned all communication with the shore. No notice was received by the ship from the charterer's agents (who knew of her arrival) as to the loading berth, and no pilot came on board until June 10, when she was taken to a berth. As the cargo had not arrived in the port area she was moved and finally reached her loading berth on June 16. As communication with the shore had been banned, the master was unable to give notice of readiness to load to the charterer's agents until June 11.

The shipowners claimed to be entitled to demurrage for time lost under clause 5 from June 3:—

*Held*, that whether the charter was a port charter or a berth charter, the words in clause 5 were wholly independent of the commencement of loading time under clause 17, and must be construed according to their natural and ordinary meaning: they put the risk of time wasted in waiting for a berth upon the charterer, and such time (from June 3) counted as loading time although the master had not given notice of readiness to load.

*Semble* (*per* Singleton and Parker L.JJ.) the charter was a berth, not a port, charter, and accordingly lay time would not normally begin to run (subject to clause 5) before the vessel had arrived in berth.

Decision of McNair J. reversed.

Appeal from McNair J.

By a charterparty dated May 18, 1951, between the North River Freighters Ltd., owners of the Steamship *Radnor*, and the President of India as charterer, it was agreed that the *Radnor* should "proceed to one safe berth Dairen (Manchuria) always "afloat, and there load a full and complete cargo of soya beans ". . . which the charterers bind themselves to ship, and being "so loaded the vessel shall proceed to Madras and Calcutta in "charterers' option," at the rate or rates of freight stated in the contract.

Clause 5 of the charterparty read as follows: "Cargo to be "loaded as per clauses 17 and 18. The notice to be given to "the charterer's agent at Dairen. . . . Time lost in waiting for "berth to count as loading time."

Clause 7: "Demurrage at the rate of £600 a day or pro "rata any part of a day."

Clause 17: "Loading. Cargo to be loaded at the average "rate of 1,000 tons per weather working day (Sundays and "holidays excepted) provided vessel can load at this rate. Lay "days to commence 24 hours after vessel is dunnaged, matted "and all hatches ready for cargo, and captain having given "written notice (within business hours . . .) to that effect to "charterers or their agents."

Clause 29A: "Master is to give Dairen at least 7 days' notice "of his readiness to load, and in addition is to telegraph them "his sailing from the last port of discharge before proceeding to "Dairen."

The following facts were found by the umpire, who made his award in the form of a special case stated for the opinion of McNair J.: "5. The S.S. *Radnor* arrived off Dairen on Sunday, "June 3, 1951, at 7.30 a.m. and stopped, awaiting a pilot. At "7.44 a.m., no pilot having arrived, the *Radnor* anchored in the "quarantine anchorage and at 8 a.m. the customs officials and "a doctor boarded the vessel. Pratique was granted at 9.30 "a.m. About 12 officials went on board the vessel, of whom "one spoke English and acted as interpreter. All shore leave "was forbidden, as was the use of the ship's radio and the placing "of any of the ship's boats in the water. The ship's radio was "sealed up by the customs officials who also removed from the "vessel all customs papers, crew lists, manifests, bill of health "and other papers, including the ship's register. Before the "officials left the vessel, the master requested the interpreter "and the doctor to take a notice of readiness ashore and hand it "to the charterer's agents. They both refused to do this. The "master alleged, and I accept his evidence, that the officials "(through the interpreter) informed him that the agent would "himself come out to the ship the next day, and would give the "master the necessary information regarding loading arrange-"ments, and where the vessel should berth.

"6. The charterer's agents did not send a representative on "board the *Radnor* the following day, June 4, nor at any time "while the vessel was waiting at the quarantine anchorage. She "was kept there until 4.30 p.m. on Sunday, June 10, when a "pilot went on board and the vessel was taken to a berth at pier "No. 3 where she arrived at 6.30 p.m. on June 10, 1951.

"7. It was not possible for the master during this period "between 7.30 a.m. on June 3 and 6.30 p.m. on June 10 to go, "or send a boat, ashore or to communicate in any way with the "shore or with the charterer's agents.

"8. The *Radnor* as from 9.30 a.m. on June 3, 1951, was "completely ready in all respects (i.e., dunnaged, matted and "all hatches ready for cargo) to load her cargo under the said "charterparty.

"9. A representative of the charterer's agents went on board "on Monday, June 11, 1951, when the master gave him a notice "of readiness bearing that date which the said representative "accepted as from 10 a.m. on that day. The agents declined "to accept responsibility for the delay in the anchorage on the "ground that the harbour master allocated berths and ordered "vessels into port.

"10. No evidence was given whether or not the notice pro-"vided for in clause 29A of the charterparty was given by the "master to the charterer's agents at Dairen. No allegation was "made by the charterer that it had not been sent. I assume, "therefore, that it was sent either by the master or the ship's "agent when the vessel sailed from Moji in Japan towards "Dairen as this would be a matter of routine. In any event, I "am satisfied and so find that the charterer's agents at Dairen "had knowledge of the arrival of the *Radnor* at Dairen on June 3, "1951."

On June 11 the vessel was moved to another berth at pier No. 3, and she remained there until June 16, when she proceeded to a loading berth at pier No. 2. Loading commenced at 2.20 p.m. on June 17 and was completed at 11.50 a.m. on June 25. The delay from June 11 to 17 was due, the umpire found, to the fact that the cargo had not arrived in the port area.

The shipowners claimed that they were entitled to be paid at the agreed rate of demurrage for time lost while the ship was waiting for a berth, whether the contract was a berth charter, as they contended, or a port charter. The charterer contended that time had not been lost within the meaning of the words in clause 5 as loading time had not begun nor had lay days commenced because no notice of readiness had been given under clause 17.

The umpire arrived at the following conclusions: " 16. I find, " so far as they are questions of fact, and I hold, subject to " the opinion of the court, so far as they are questions of law, " as follows: (1) When the *Radnor* arrived at the quarantine " anchorage at Dairen, she was within the commercial area of " the port of Dairen. (2) The vessel was delayed at the " quarantine anchorage from 9.30 a.m. on June 3 until 4.30 p.m. " on June 10, 1951. (3) I am satisfied that if a berth had been " ready for the *Radnor* a pilot would have been available to take " the vessel to her berth when she arrived and the vessel was, " therefore, kept waiting for a berth from 9.30 a.m. on June 3 " until 4.30 p.m. on June 10, 1951. (4) The wording in clause " 5 of the charterparty ' Time lost in waiting for berth to count " ' as loading time ' was independent of the provision that lay-" days were to count from 24 hours after notice of readiness " had been given. While the lay days did not commence until " 10 a.m. on June 12, 1951, the burden of the time lost before-" hand while the vessel was waiting for a berth is placed by the " charterparty on the respondent."

On June 29, 1955, McNair J. accepted the contention of the charterer and reversed the decision of the umpire.

The shipowners appealed.

*Eustace Roskill Q.C.* and *R. A. MacCrindle* for the shipowners. The umpire awarded the owners £4,975. The judge reversed that award, holding that time lost by delay in waiting for a berth could not count until lay days had begun to run. The question for decision on this appeal, therefore, is what do the words " Time " lost in waiting for berth to count as loading time " mean. The owners say that the ship was kept waiting for a berth from 9.30 a.m. on June 3, 1951, until 4.30 p.m. on June 10, 1951, and that the umpire was right in holding that the time so lost must count as loading time. The charterparty clearly provides that the risk of such delay falls upon the charterer. This is a berth charterparty as opposed to a port charterparty and the owners could not give notice of readiness to load until 24 hours after the vessel had arrived in the berth to be designated by the charterer. Moreover, the owners could not give notice of readiness because the ship was incommunicado. Clause 17 of the charterparty provides for loading time, and the words "time lost in waiting "for berth," etc., were intended to give the owners an additional right, because the ship was unable to give notice of readiness until she got into a loading berth. The judgment of the judge misapprehends the difference between lay time and time lost in waiting for a berth. The judge appears to treat the words "time "lost," etc., as surplusage. Even if the charterparty had been a port charterparty the owners should, in the circumstances of the case, succeed on their claim, because it has been found as a fact that time was lost waiting for a berth. [*Leonis S.S. Co.* v. *Rank Ltd.*[1] was cited.]

*John Megaw Q.C.* and *J. F. Donaldson* for the charterer. The basis of the owners' argument is that the vessel had not "arrived" until she got into a berth. As to the meaning of "arrived ship" there is some confusion between the definition in Scrutton on Charterparties, 16th ed., art. 39, p. 137, and the definition of Kennedy L.J. in *Leonis S.S. Co.* v. *Rank Ltd.*[1] Scrutton, in article 39, says that at the port of loading the rights of the shipowner and the obligations of the charterer as regards loading the cargo depend on the following facts: (1) The ship must be at the place where she is bound to be ready for cargo; (2) ready to load; and (3) notice of readiness must be given. That is not the meaning given by Kennedy L.J., who says that she is an arrived ship when she arrives at the specified contractual destination.[2] The only distinction between a berth and port charterparty is the place where the ship has to be before she can validly give notice of readiness. If it be a port charterparty time cannot be lost until everything has been done which contractually has to be done to make time count. It was nobody's fault that the ship could not get into berth. In order to be time lost in waiting for a berth it must be time which would otherwise have been gainfully employed for the purposes of the ship. It is not accepted by the charterer that the charterparty was purely a berth charterparty, or that notice of readiness to load could not have been given when the ship was lying in the anchorage. If she had not been ready it could not be said that time was being lost.

[SINGLETON L.J. Notice of arrival having been given under clause 29A of the charterparty, was there an obligation on the charterer to nominate a berth as soon as the vessel arrived in port?]

[1] [1908] 1 K.B. 499.

[2] Ibid. 517.

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It was his duty to nominate a berth within a reasonable time, and what a reasonable time was depends on the circumstances of the port. It has never been alleged that the charterer failed in any contractual duty. There is no evidence that the charterer was under an obligation to nominate a berth before June 10. It is to be observed that under clause 5 time lost is to "count as," and not to "be deemed to be," loading time. The intention, it is submitted, is that the "time lost" is to be included in the numerical calculation of loading time. [Reference was made to *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*,[3] *Aktieselskabet Inglewood* v. *Millar's Karri and Jarrah Forests Ltd.*[4] and *The Felix.*[5]]

*MacCrindle* replied.

*Cur. adv. vult.*

Dec. 8, 1955. The following judgments were read.

Singleton L.J., having stated the facts, continued: The questions which have to be decided are whether the period during which the vessel was kept waiting is time lost in waiting for a berth and whether under words in the charterparty the charterers have to pay for it.

There is some uncertainty as to conditions at the port of Dairen at the beginning of June, 1951, and there is nothing to show whether they were unusual at the port. It is, however, interesting to notice from paragraph 9 of the award that the charterers' agents declined to accept responsibility for the delay in the anchorage on the ground that the harbour master allocated berths and ordered vessels into port. If this was the regular practice, it should have been within the knowledge of the charterers' agents. Furthermore, it does not appear that the cargo was within the port area until about June 16.

What were the duties of the parties? Upon the owners was the duty of seeing that the vessel proceeded to Dairen and that the notices called for in clause 29 were given. There was no dispute as to this, and the umpire drew the inference that the notices were given: and he was satisfied that the charterers' agents at Dairen had knowledge of the arrival of the *Radnor* at Dairen on June 3, 1951. The duty upon the charterers was to make arrangements for a berth and for the cargo, and to communicate to the master of the vessel the berth they had arranged. It is not disputed that the communication had to be made within a reasonable time. Prima facie, that would be when they knew of the arrival of the vessel at the port of Dairen. The object of the notices required under clause 29 (A) is to enable them to know the approximate time of the vessel's arrival and to make arrangements accordingly. Until the master was told the berth to which the vessel had to go, he could do nothing. As the award shows, the vessel was kept waiting for over seven days after she arrived at the port without any communication being made to her by the charterers. It was not contended that this was a reasonable time.

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[3] [1891] 2 K.B. 647, 652; 7 T.L.R. 704.

[4] (1903) 8 Com.Cas. 196; 19 T.L.R. 405.

[5] (1868) L.R. 2 A. & E. 273.

The owners do not rely upon any breach of contract on the part of the charterers. They claim that that which happened is provided for in the charterparty by the words: "Time lost in "waiting for berth to count as loading time." "Time lost" in that sentence means time lost to the ship, time wasted, or time which has gone to no purpose. The finding of the umpire is that if a berth had been ready for the *Radnor* a pilot would have been available to take her to her berth when she arrived and the vessel was, therefore, kept waiting for a berth from 9.30 a.m. on June 3 until 4.30 p.m. on June 10. I would add that I find it difficult to see, on the facts stated, how the charterers can say that time was not lost in waiting for a berth if, as I have said, there was a duty on them to nominate a berth, and they failed to do so when they knew that the vessel had arrived at the port.

The submission made on behalf of the charterers is that time was not lost within the meaning of the words in clause 5, as time lost was to count as loading time, and loading time had not begun nor had lay days commenced, as no notice had been given under clause 17 of the charterparty. Time may be spent but it is not time lost unless notice has been given, it is said. McNair J. accepted this submission. He said: "As it seems to me, the "critical question in this case is: From what point of time does "time begin to be lost? Can time be lost before it begins to "run? I think not. It seems to me that it is a contradiction "in terms if one answers that question in the affirmative. "Accordingly, I look to the charterparty to see whether the "parties have by their express bargain dealt with the problem of "when time begins to run. I find in clause 17 that they say in "terms that lay days are to commence '24 hours after the vessel "'is dunnaged, matted and all hatches ready for cargo, and "'the captain having given written notice within business "'hours'—as set out—'to that effect to the charterers or their

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"'agents.' There they say in terms when the lay days are to "commence. I can see no reason why the phrase 'lay days to "'commence' is any different from 'loading time to start.' "Accordingly, under this charterparty it seems to me that the "loading times start when those two conditions are satisfied, "namely, the vessel is dunnaged and matted and all hatches "ready for cargo, and the captain has given the particular form "of notice required. For present purposes I need not decide "where the ship must be when these conditions have to be "satisfied. If that is accurate, as I believe it to be, then time "does not appear to be lost until notice has been given, and it "seems to me that it is irrelevant on this view that [clause 5] "adds nothing to the common law position. The particular "phrase or sentence is 'Time lost in waiting for berth to count "'as loading time.' It is to be observed that it does not say "that time lost in waiting for berth is to be 'deemed to be' part "of the loading time. It merely is 'to count' as part of the "loading time, which means that it falls within the numerical "calculation of lay time. That is the construction which, with "the assistance of listening to the arguments which have been "addressed to me, I place upon this particular charterparty."

I do not take this view. The clause as to time wasted is independent of clause 17. It is inserted to avoid questions which have arisen in many cases which have been before the courts. The risk of time wasted in waiting for a berth is put upon the charterers whose agents are, or ought to be, familiar with local conditions. The clause might have provided simply that time lost in waiting for a berth should be paid for at the rate of £600 a day. As drawn, it gives the charterers an advantage, for they may save on loading time some, or all, of the time lost in waiting for a berth. The time lost is to count as, or to be added to, loading time in order to ascertain the position between the parties. I am unable to accept the view that under the words in clause 5 time is not lost until notice has been given under clause 17.

There is no magic in a charterparty: it is the contract in which the rights and obligations of the parties to it are found. Upon the terms of this contract it is clear, I think, that the risk of time lost through waiting for a berth is undertaken by the charterers, and there is nothing which deprives the owners of the right which, on the face of the document, is given to them. Again, it appears to me that the master could not give the notice envisaged in clause 17 of the charterparty until the vessel arrived at the nominated berth. Upon the charterparty, she had to proceed to "one safe berth Dairen." She would not reach her destination until she reached her berth: and it was for the charterers to arrange the berth and inform the master accordingly. There would be no point in a notice under clause 17 if the vessel had not reached the place at which she was bound to be ready for cargo. It could be no more than a notice: "I will be ready "to receive cargo when I get to a berth." A notice to this, or the like, effect would be of no help to the charterers, nor would it be a notice within clause 17, having regard to the terms of the contract.

In my opinion, the provision as to notice in clause 17 does not affect the question arising under clause 5 of the charterparty, and the lack of a notice under clause 17 does not avoid the owners' rights in regard to time lost through waiting for a berth. The notice is something which has to be given for the purpose of calculating lay days. That calculation is independent of the provision in clause 5, though the one has to be added to the other to reach the true position under the contract. There was certainly no obligation on the master to give a notice under clause 17 when the vessel arrived at—or perhaps I should say reached—the port of Dairen. The charterers knew of her arrival and the next step was for them to nominate the berth to which they wished her to go. If they failed to do so within a reasonable time, and without any adequate explanation, time was lost by the ship in waiting for a berth. It was to meet such a case that the words in clause 5 were inserted in the charterparty. The dispute cannot be solved merely by deciding whether this is a port or a berth charter, though, as I have indicated, I would regard it as a berth charter.

I have sought to deal with the appeal in as simple a way as possible and without reference to the authorities which were cited to us. I feel that the case ought to be looked upon as an ordinary claim under a contract and that, when it is so regarded, the owners are entitled to succeed. I would allow the appeal, and direct that the award of the umpire be restored.

Jenkins L.J. This is an appeal from a judgment of McNair J. dated June 29, 1955, on an award stated in the form of a special case by an umpire appointed under the provisions for arbitration contained in a charterparty dated May 18, 1951, between North River Freighters Ltd. as owners, and His Excellency the President of India as charterer, of the steamship *Radnor*.

The arbitration concerned the amount of demurrage payable by the charterer, and the sole point now at issue between the parties is whether, by virtue of a provision in the charterparty to the effect that time lost waiting for berth should count as loading time, a period of seven days and seven hours during which the *Radnor* was kept waiting for a berth at the port at which she was to load should be included in the calculation, at the rate of £600 per day prescribed by the charterparty, of the total amount of demurrage for which the charterer is liable. I understand it to be now agreed that if this period of waiting ought to be included in the calculation as time lost waiting for berth within the meaning of the charterparty, the balance due from the charterer to the owners in respect of demurrage, over and above sums already paid or admittedly owing, would be £4,975 as found by the umpire, and that we need not concern ourselves with an alternative method of calculation which he left it open to the court to adopt and which would have the effect of reducing the balance due from the charterer on this footing to £4,912 9s. 4d.

Subject to the opinion of the court, the umpire decided that the owners were entitled to demurrage in respect of the period of waiting I have mentioned, which he held to be "time lost "waiting for berth" within the meaning of the charterparty, and accordingly awarded the owners, in addition to a sum of £158 6s. 8d. admittedly due to them from the charterer, the further sum of £4,975. The question stated by the umpire for the opinion of the court, so far as now material, was in effect whether, on the facts found by him and on the true construction of the charterparty, the owners were entitled to this additional sum of £4,975. To point the issue of law implicit in the amount awarded, the question may be restated as being whether, upon the true construction of the charterparty and on the facts found by the umpire, the period of waiting undergone by the *Radnor* before she was berthed was, within the meaning of the charterparty, "time lost in waiting for berth" and therefore to be counted as loading time. The judge differed from the conclusion reached by the umpire on this question of law. He held that the period during which the *Radnor* was kept waiting for a berth was not "time lost in waiting for berth" within the meaning of the charterparty, and accordingly, that the owners were not entitled to any further payment other than the £158 6s. 8d. admittedly due. From his judgment to that effect the owners now appeal to this court.

The charterparty was based on a well-known printed form, with numerous cancellations, substitutions and additions. By clause 1 (so far as material for the present purpose) the *Radnor*, expected ready to load at Dairen under the charter about May 29, 1951, was to proceed to "one safe berth Dairen," and there load a full and complete cargo of soya beans or maize or wheat or kaoliang or milo in bulk, 9,000 tons 10 per cent. more or less at captain's option, and being so loaded to proceed to Madras or Madras and Calcutta in charterer's option and there deliver the cargo on being paid freight as therein mentioned. Clause 5 of the printed form, entitled "Loading," was extensively altered so as to read: "Cargo to be loaded as per clauses 17 and "18. The notice to be given to the charterer's agent at "Dairen. . . . Time lost in waiting for berth to count as loading "time." The critical concluding sentence of this clause was part of the printed form.

Clause 17 was in these terms: "Loading. Cargo to be loaded "at the average rate of 1,000 tons per weather working day "(Sundays and holidays excepted) provided vessel can load at "this rate. Lay days to commence 24 hours after vessel is "dunnaged, matted and all hatches ready for cargo, and captain "having given written notice (within business hours 10 a.m. to "5 p.m., Saturdays 10 a.m. to 1 p.m.) to that effect to "charterers or their agents. Charterers' stevedores to be "employed in loading, but charterers not to be answerable for "any negligence, default or error of judgment of stevedores "employed."

Clause 6 relates to discharge and is not directly material, but may be noticed as concluding with a form of words similar to the last sentence of clause 5: "Time lost in waiting for berth to count "as discharging time." Clause 7 provides for "Demurrage at "the rate of £600 per day or pro rata for any part of a day at "ports of loading and discharging. Owners to pay charterer "despatch money as per clause 21." Clause 21 provided as follows: "Despatch money is payable for working time saved in "loading and discharging at the rate of £200 per day or pro "rata." Clause 29 (A) is the last provision to which it is necessary to refer and is in these terms: "Master is to telegraph. "(A) Master is to give charterers' agents at Dairen at least seven "days' notice of his readiness to load, and in addition is to "telegraph them his sailing from last port of discharge before "proceeding to Dairen."

I should next refer to some of the paragraphs in the case, in which the facts as found by the umpire are set out. I begin with paragraph 5. I make this comment: Mr. Megaw, for the charterer, objected to the last sentence of this paragraph on the ground that the master's evidence of what the officials told him as to the intentions of the charterer's agents was inadmissible. I accept this objection, as did the judge, and accordingly ignore the passage in question.

Paragraph 16 states succinctly the view taken by the umpire, and in the submission of the owners rightly taken by him, on the question of law referred to the court. The opposing view, which commended itself to the judge, and which the charterer is concerned to support, is to the effect that, even though the vessel was in fact ready to load and ready to proceed to whatever berth the charterer might designate for the purpose of loading, time could not begin to be lost waiting for berth until the notice of readiness to load prescribed by clauses 5 and 17 of the charterparty had been given, and the stipulated period of 24 hours from the giving of such notice had expired, so as to make the lay days or loading time start running against the charterer.

I do not think the intervention of the local authorities described in paragraph 5 of the case has any real bearing on the question we have to decide. It is true that this intervention made it impossible for the captain of the *Radnor* to give notice of readiness to load, which he would otherwise have done at or about 9.30 a.m. on June 3, 1951, until after the vessel had berthed on June 10, the notice in fact being given on the following day. But it was not contended before us on the part of the owners that this impossibility absolved them from the necessity of giving such notice in order to make the lay days or loading time begin to run, or entitled them to treat the notice as having been given any sooner than it was in fact given. On the other hand, it was not contended before us on the part of the charterer that the intervention of the local authorities made it impossible for the vessel to proceed to a berth any earlier than 4.30 p.m. on June 10, 1951, or absolved the charterer from his obligation to designate the berth to which she was to proceed. Indeed, it was hardly open to the charterer so to contend in the face of the umpire's findings in paragraphs 16 (2) and (3) of the case.

The matter must, therefore, as it seems to me, be dealt with on the footing that the *Radnor*, having arrived in the commercial area of the port of Dairen, was in fact ready to load and ready and able to proceed to any berth the charterer might designate by 9.30 a.m. on June 3, but was kept waiting for a berth until 4.30 p.m. on June 10, owing to the charterer's failure to nominate the berth to which she was to proceed. In these circumstances, it seems to me to be clear that the period from 9.30 a.m. on June 3 to 4.30 p.m. on June 10 was "time lost in waiting for "berth" according to the natural and ordinary meaning of those few simple words, with the result that, unless some qualification of their natural and ordinary meaning is to be read into them, the period in question must count as loading time by the express terms of clause 5 of the charterparty.

It is, however, contended on the part of the charterer, in effect, that the words "time lost" in waiting for berth to count "as loading time" must, as a matter of necessary implication, be qualified by inserting after the words "time lost in waiting for "berth" some such words as "after notice of readiness to load "has been given," or (to reflect the argument with strict accuracy) "after the expiration of 24 hours from the giving by "the captain of notice of readiness to load, the vessel having "reached the destination prescribed by the charterparty and "being in fact ready to load." It is said that the necessity for this implication resides in the use of the word "lost" and the words "to count as loading time." "Time," it is said, cannot be "lost" in waiting for berth until time has begun to run. It is said that the owners cannot claim that if there had been no delay in berthing, loading would have begun any sooner, because the charterer would not have been under any obligation to begin loading until 24 hours after receipt of notice of readiness to load, and such notice was not in fact given until June 11, 1951, after the period of waiting for a berth was over. Furthermore, it is pointed out that the time lost is to "count as," not "to be "deemed to be," loading time, and it is said that this shows that the intention is not to make that which is not loading time notionally constitute loading time, but to ensure that loading time of a particular sort (that is to say, any period elapsing between the time from which loading time begins to run and the time at which the charterer designates the berth to which the vessel is to proceed) is to be included in the numerical calculation of loading time.

In adopting this view of the matter, the judge said: "As it "seems to me, the critical question in this case is: From what "point of time does time begin to be lost? Can time be lost "before it begins to run? I think not. It seems to me that "it is a contradiction in terms if one answers that question in "the affirmative. Accordingly, I look to the charterparty to see "whether the parties have by their express bargain dealt with "the problem of when time begins to run. I find in clause 17 "that they say in terms that lay days are to commence '24 hours "'after the vessel is dunnaged, matted and all hatches ready "'for cargo, and the captain having given written notice within "'business hours'—as set out—'to that effect to the charterers "'or their agents.' There they say in terms when the lay days "are to commence. I can see no reason why the phrase 'lay "'days to commence' is any different from 'loading time to "'start.' Accordingly, under this charterparty it seems to me "that the loading times start when those two conditions are "satisfied, namely, the vessel is dunnaged and matted and all "hatches ready for cargo, and the captain has given the particular "form of notice required. For present purposes I need not decide "where the ship must be when these conditions have to be "satisfied. If that is accurate, as I believe it to be, then time "does not appear to be lost until notice has been given, and it "seems to me that it is irrelevant on this view that line 67 "[clause 5] adds nothing to the common law position. The "particular phrase or sentence in line 67 is 'Time lost in waiting "'for berth to count as loading time.' It is to be observed that "it does not say that time lost in waiting for berth is to be "'deemed to be' part of the loading time. It merely is 'to "'count' as part of the loading time, which means that it "falls within the numerical calculation of lay time. That is "the construction which, with the assistance of listening to the "arguments which have been addressed to me, I place upon this "particular charterparty."

The main argument on the owners' side was simply to the effect that it was not necessary to give notice of readiness to load before time could begin to be lost waiting for berth within the meaning of clause 5 of the charterparty, and that for this purpose any period of waiting for berth undergone by the vessel after she had, to the knowledge of the charterer, reached the commercial area of the port was time lost waiting for berth if the vessel, so far as she was concerned, could have been in her berth and ready to load by the commencement of such period, but for the failure of the charterer to designate the berth to which she was to proceed. If this is the right test, there can be no doubt that the disputed period of seven days and seven hours was, on the facts found by the umpire, "time lost waiting "for berth" within the meaning of clause 5. For the owners, it is further pointed out, and I think there is great force in this, that the words "time lost in waiting for berth to count as loading "time" are appropriate to bring into the calculation of loading time a period which otherwise would not be loading time, and that the view taken by the judge and supported in argument by counsel for the charterer would reduce the words in question to no more than a statement that a period, which without them would be loading time in any case, is to count as loading time, thus making them to all intents and purposes a mere idle and otiose expression of a consequence which would equally have ensued if they had been omitted. I would add that, from a practical point of view, the fact that notice of readiness to load was not given until the period of waiting for berth was over could not affect the loss of time brought about by such period of waiting, for loading could not in any case begin until the vessel was berthed.

For the purposes of their main argument, counsel for the owners were content to assume that the charterparty here in question was a "port" as distinct from a "berth" charterparty. But the critical importance attached by the charterer's argument and the judge's decision to the giving of notice of readiness to load led to considerable argument on the question whether this charterparty belonged to the "port" or the "berth" type. For the owners, it was submitted that, while they were entitled to succeed on either view, the true view was that this was a "berth charter" and that, if it was a berth charter, they had an unanswerable case even if their main argument was rejected. For the charterer, it was submitted that this was a "port "charter" but that, while his argument was easier to sustain on that footing, he was entitled to succeed whether it was a "port "charter" or a "berth charter." The judge's reasoning shows, I think, that he treated it as a port charter, though he did not expressly say so.

So far as it is necessary to go into the distinction between "port" and "berth" charters, I understand it to be that in the case of a port charter (that is to say, a charter which requires the vessel to proceed for loading to a named port but not to some particular berth either specified in the charter or by the express terms of the charter to be specified by the charterer) the charterer has an implied right to nominate the particular berth to which the vessel is to go, but that lay days begin to run so soon as the vessel has arrived in the commercial area of the port, is ready to load, and has given notice to the charterer in manner prescribed by the charter of her readiness to load; whereas in the case of a berth charter (that is to say, a charter which requires the vessel to proceed for loading to a particular berth either specified in the charter or by the express terms of the charter to be specified by the charterer) lay days do not begin to run until the vessel has arrived at the particular berth, is ready to load, and has given notice to the charterer in manner prescribed by the charter of her readiness to load.

On the owners' side it is said that the requirement in clause 1 of the present charterparty that the vessel should proceed to one safe berth Dairen sufficed to make this a berth charter, and that if it was a berth charter no effective notice of readiness to load could be given until the vessel had reached the berth designated by the charterer. Therefore (so it is argued) time was clearly lost by the vessel in waiting for berth, since the delay in berthing brought about a corresponding delay in the giving of the notice of readiness to load, and consequently in the commencement of the lay days. But, even if this is a port charter, the result, say counsel for the owners, is the same, given acceptance of their main argument, the effect of which I have summarized above.

For the charterer, on the other hand, it is urged that if this is a port charter, as it is submitted to be, he must clearly succeed, for the reasons which I hope I have sufficiently stated earlier in this judgment, inasmuch as on that footing (apart from the intervention of the local authorities described in paragraph 5 of the case, which, for reasons already given, I ignore) notice of readiness to load could have been given so soon as the vessel arrived in the commercial area of the port and was in fact ready to load. I hope I will not be thought disrespectful of the argument on the charterer's side on the footing that, contrary to the foregoing submission, this was a berth charter, if I content myself by saying that it seems to me to be fraught with insuperable difficulties. In particular, on the footing that this was a berth charter, I cannot accept the submission that the words "time lost in waiting for berth to count as loading time" should be given the effect of accelerating what is normally the appropriate time for giving notice of readiness to load under a charter of that description.

Having given the best consideration I can to the submissions made on either side, I have come to the conclusion that the owners should succeed on their main argument, and accordingly find it unnecessary to decide the difficult and technical question whether this was a "berth" or a "port" charter. But I think the owners are to some small extent assisted by the circumstance that the words "time lost in waiting for berth to "count as loading time" occur in a printed form equally adaptable as a berth or a port charterparty. Accordingly, I would allow this appeal.

Parker L.J. I agree. There is no doubt, having regard to the finding in the special case, that the vessel was kept waiting for a berth from 9.30 a.m. on June 3 until 4.30 p.m. on June 10, 1951. The sole question is whether that time is "time lost" within the meaning of the words "Time lost waiting for berth "to count as loading time" in clause 5 of the charterparty. Prima facie, those words cover this case. The vessel had been made ready for cargo by 9.30 a.m. on June 3, 1951, and would have gone to a berth if one was available. How, then, can it be said that the time spent in waiting for a berth was not time lost to the ship? But for that period of waiting, the vessel would, so far as she was concerned, have been in a position to take on cargo over seven days earlier. A ship is a money-earning machine, and time during which she could have earned money was wasted or lost.

The charterer, however, contends that time cannot be said to have been "lost" until it has begun to run. The words in question follow (in the amended form of clause 5) the provision in clause 17 for the giving of a written notice of readiness to load, 24 hours after which loading time commences. Accordingly, so runs the argument, as a matter of construction or by necessary implication, "time" is not "lost" until that notice has been given and loading time has commenced. Reliance is also placed on the words "to count as loading time," it being contended that those words show that the parties did not intend to treat time as loading time which was not loading time. These contentions were accepted by the judge in the passage which my Lords have read.

I find myself unable to accept this view. No doubt "time" cannot be said to be "lost" until it has begun to run, but it surely begins to run when the vessel has reached the point where she has to stop until a berth is available. It seems to me that that is the natural meaning of the words, and that the expression is wholly independent of the time when loading time commences.

If in any case a charterer could show that, even if a berth had been available, the vessel could not have been ready for cargo, he would be able to say that all the time occupied in waiting for a berth had not been "lost," but the finding here is that at 9.30 a.m. on June 3, 1951, the vessel was "dunnaged, matted and "all hatches ready for cargo." Nor do I think that the words "to count as loading time" assist the charterer. They are, as it seems to me, more appropriate to deal with a period which, though not loading time, is to be added to the loading time when the final calculation is made.

So far I have been content to assume that the charter in question is a port charter, and not a berth charter, but I have considerable doubts as to whether that is the true position. No doubt where the charter is in the form "That the vessel shall "proceed to . . .", a named port, "and there load at one safe "berth," the charter is a port charter. The contractual voyage is to the port, albeit that the owners must obey the charterer's instructions as to the berth nominated by the latter. Here, however, the contractual voyage is not to the port of Dairen, and if necessary I would have held that this is a berth charter. If this is the true view, then it seems to me that the charterer's contention is almost unarguable. Apart, at any rate, from a case where the charterer is in breach in failing to nominate a berth, the notice of readiness cannot be given until the vessel is at the berth. Accordingly, on the charterer's contention, the words in question would add nothing. I cannot accept the suggestion that the words are apt to make the ship an arrived ship so as to enable a notice of readiness to be given before she reaches her contractual destination. Be that as it may, I think that, however this charter is treated, the words in question, as the umpire held, are independent of the provision in Clause 17 as to when loading time is to commence.

*Appeal allowed.*
*Leave to appeal to House of Lords.*

Solicitors: *Stokes & Mitcalfe; William A. Crump & Son.*

A. W. G.

# REGINA v. WARD.

C. C. A.

1956
*Jan.* 11.

Lord Goddard C.J., Stable and Ashworth JJ.

*Criminal Law—Murder—Intention to kill or cause grievous bodily harm —Test of "reasonable man"—Man of sub-normal intelligence—Death of child—Child shaken in fit of temper—Only intention to make child be quiet.*

A man of sub-normal intelligence was charged with the murder of an eighteen-months-old child. At his trial he said that the child was crying and would not be quiet and that he had lost his temper, and that in his temper he had picked the child up and shaken her, with his "full force"; he said that he had had no intention of killing the child or hurting her in any way and that there was no thought in his mind except to make her be quiet. On this part of the case the judge directed the jury: "If, when he did the act "which he did do, he must as a reasonable man have contemplated "that death or grievous bodily harm was likely to result to the "child as a result of what he did, then . . . he is guilty of "murder. If, on the other hand, he could not, as a reasonable "man, have contemplated that death would result in consequence "of what he did, then he is guilty of manslaughter." The jury returned a verdict of murder. On appeal, on the ground of misdirection, it was contended that the objective test of what a "reasonable man" would have thought or contemplated was inappropriate, except in cases where death occurred in the course of a felony or of resisting arrest, and that the proper test to apply was the subjective test of what did the particular man himself, with his particular peculiarities and mentality, think or contemplate:—

*Held*, that the same test must be applied to all alike and that the only measure which could be brought to bear was what a reasonable man would or would not have contemplated. Accordingly, the direction given by the judge was, in the circumstances, a perfectly proper direction and there were no grounds for quashing the conviction.

APPEAL against conviction.

The appellant, Clarence Walter Ward, was charged at Leeds Assizes with the murder, on a date unknown, of an eighteen-months-old child, the daughter, by another man, of a woman with whom he was then cohabiting. The appellant was admittedly a man of sub-normal intelligence. At the time of the child's death the mother had gone out to do some shopping and the appellant was alone in the house with the child. The mother was away for about 15 minutes and when she came back the child was dead. The appellant and the mother took the body of the child and buried it on the edge of a slag heap, where it remained for about 20 months. When discovered, the body was in an advanced state of decomposition, but the skull was found to be fractured in two places.

The following summary of the evidence is taken from the opening address to the Court of Criminal Appeal made by counsel for the appellant. The account given by the appellant at the trial was that he had come back from work at about 6 p.m. and had taken a hammer to mend the bed; the child was on the bed and he took the mattress off the bed, put it on the floor, and placed the child in the middle of it; he started to mend the bed and had to use the hammer to put in the bolts; the child was crying and he spoke to her but she would not be quiet; he carried on hammering the bolts, and the child still would not be quiet, and he went up to her, picked her up, and shook her "in "my temper," and put her down again on the mattress; as he took his hands away from the child, she dropped forward and sideways. The appellant said that he had completely lost his temper because of "pains in my stomach with ulcers and being "working all day and coming home and having to repair the "bed and the child always crying, continually crying" and that he had just lost his temper and wanted to shake the child and make her be quiet. He had used his "full force"; he did not want the child to die and had had no intention of killing her or hurting her in any way; there was no thought in his mind except to make her be quiet. Medical evidence was given for the prosecution that the fractures in the skull were not enough by themselves to cause death, and the theory advanced by one of their witnesses, Dr. Polson, was that something more had been done to the child to cause her death, which was probably due to asphyxia.

Pilcher J., summing up, directed the jury that "If, when "he did the act which he did do, he must as a reasonable man "have contemplated that death or grievous bodily harm was "likely to result to the child as a result of what he did, then, "members of the jury, if you are satisfied about that, he is guilty "of murder. If, on the other hand, he could not, as a reasonable "man, have contemplated that death would result in conse-"quence of what he did, then he is guilty of manslaughter. In "law a man is presumed to intend the natural consequences of "his act, and if he therefore acts in a fashion in which a "reasonable man would contemplate that he would do serious "injury to the child, a child of 18 months, and death results, "then he is guilty of murder. But you have got to be satis-"fied about that, and satisfied upon the evidence so that you "can say you feel sure that this man must have contemplated "in doing what he did that he would seriously injure this child, "and if you are satisfied about that, he is guilty of murder," and he invited the jury to direct their minds to the point "namely, whether the accused, when he did what he did, must "have contemplated that death or some serious injury would "result from his act. If you are satisfied with that you will "find him guilty of murder." After referring to the evidence the judge said: "If you are not satisfied that you feel quite "certain that Dr. Polson's theory must be right but are none "the less satisfied that the accused man was offering this child "such serious violence that he must have contemplated that he "would either kill it or injure it seriously, then even if you "cannot dogmatize as to the exact fashion or to the exact violence "which was inflicted, you will be entitled to find him guilty of "murder."

After the jury had considered their verdict for about three hours they sent the following note to the judge: "Your Lord-"ship said in summing up 'if the members of the jury are not "'satisfied with Dr. Polson's evidence but are satisfied that the "'accused man in offering serious violence . . .' Can the jury "have the completion of this ruling?" Pilcher J. said that the jury might remember that he had read out a passage to them early in the summing-up and he would re-read it to them. "'If, "'when the person did the act which he did do, he must as a "'reasonable being have contemplated that death or grievous "'bodily harm was likely to result, he was guilty of murder.' "Now, I have substituted 'serious injury' for 'grievous bodily "'harm' so I will read it again . . ."

The jury, after a short absence, returned a verdict of murder, and the appellant appealed on the ground, inter alia, that the judge had misdirected the jury as to the proper tests to be applied in determining whether the appellant had committed the crime of murder or of manslaughter, in particular (a) by directing them, both in his address to them and in answer to their question, that if, when the appellant did the act which caused the death of the child, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he was guilty of murder, that being a test only appropriate, if at all, in a case of killing whilst doing a felonious act, and (b) by failing to direct them that before they could return a verdict of murder they must be satisfied that the appellant had an intention either to kill or to do grievous bodily harm, and that in the event of their negativing any such intention, or upon a review of the whole of the evidence, being left with a reasonable doubt whether there was such an intention, they should return a verdict of guilty of manslaughter.

*Rudolph Lyons Q.C.* and *Edward Lyons* for the appellant. The misdirection complained of is that the judge told the jury that the test to be applied in determining whether the appellant was guilty of murder or manslaughter was what a "reasonable man" would have contemplated would result from his act. The proper test to be applied, except in the two exceptional cases of felony or of resisting an officer of justice, is the subjective test: what the accused man himself thought or contemplated. [Reference was made to the tests set out in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed. (1954), p. 929.] The fact that the objective test is used in cases of provocation is no justification for applying it in other cases. There is no reported case in which there is any reference to what a "reasonable man" would have thought or contemplated as opposed to what the man himself thought, except in cases where there was a felony involving violence; and there is no authority for importing that test into a case where there is no felony. The direction given by the judge was in fact that given by Avory J. in *Rex* v. *Lumley*,[1] where the death was caused in the course of a felony involving violence, but it was an inappropriate and a wrong direction in a case such as this; compare the words of Humphreys J. in *Rex* v. *Larkin*.[2]

The primary matter to be considered is what was in the mind of the accused man himself, and what he, with his particular peculiarities and mentality, thought or contemplated.

[LORD GODDARD C.J. That is setting up a varying standard.]

Although what a reasonable man would have thought is a guide, it is not the final guide; to make it a test in a case of this kind would be to extend the doctrine of constructive malice. It is not the result of the act which must be looked at, but what was in the mind of the accused at the time of the act, and whether he himself had knowledge of what he was doing.

[LORD GODDARD C.J. There was evidence for the prosecution that the skull was fractured in two places and that that was not enough to cause death but that death was probably caused by asphyxia.]

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[1] (1911) 22 Cox C.C. 635, 636; 76 J.P. 208.

[2] (1942) 29 Cr.App.R. 18, 23; [1943] 1 All E.R. 217.

The circumstances in which the jury returned and asked their question, and the opening words of the question, raise an irresistible inference that they were rejecting that evidence.

*G. Veale Q.C.* and *J. R. Cumming-Bruce* for the Crown were not called upon.

LORD GODDARD C.J. The appellant was convicted at the last Assizes for the West Riding of Yorkshire before Pilcher J. of the murder of an infant child of 18 months, the child of a woman with whom he was living. The killing of the child took place at a time when the appellant was alone in the house with the child. With the assistance of the woman with whom he was living, he buried the dead body of the child in a slag heap, and the body was not discovered for over a year after the death had taken place. It was then found that the child's skull had been fractured in two places. The body, of course, was in an advanced state of decomposition, but the skull was there until it was moved, and afterwards the whole skull disintegrated.

The medical evidence for the prosecution was that probably the fractures of the skull were not in themselves enough at the time to cause death, but the doctor's theory, advanced before the jury, was that something further was done to the child which must have caused death, the most probable cause being that she was asphyxiated. The appellant's case was that he was put into a state of violent temper because the child was crying, and he proceeded to shake the child to such an extent that when he put the child back on the mattress her head seemed to fall forward and thereupon she was apparently dead, killed through the shaking.

Whatever was the cause of death was a matter for the jury, and the judge started the earlier part of the summing-up by saying: "But if, when he did the act which he did do, he must "as a reasonable man have contemplated that death or grievous "bodily harm was likely to result to the child as a result of what "he did, then, members of the jury, if you are satisfied about "that, he is guilty of murder. If, on the other hand, he could "not, as a reasonable man, have contemplated that death would "result in consequence of what he did, then he is guilty of "manslaughter." I can only say that that seems to me to be an unimpeachable summing-up, and it is the direction which has been given to juries to one's own knowledge in scores of cases.

The jury considered their verdict for a long time, and sent a note to the judge asking for a further direction, and the final direction given by the judge to the jury was: "If, when the person "did the act which he did do, he must as a reasonable man have "contemplated that death or grievous bodily harm was likely to "result, he was guilty of murder." The objection which Mr. Lyons takes to that is that it brings in the test of a reasonable man, and you have to say whether the particular man knew. Of course, the test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would or would not contemplate. If the act is one as to which the jury can find that a reasonable man would say: "It would never occur to me that death would result or "grievous bodily harm would result," then the jury can find him guilty of manslaughter; but if the jury come to the conclusion that any reasonable person, that is to say, a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm, and the death is the result of that grievous bodily harm, then that amounts to murder in law and a verdict of murder is justified.

In these circumstances, the court cannot find any fault with the judge's summing-up. He gave the jury every opportunity of finding manslaughter if they thought fit, and the summing-up was eminently fair and correct. The appeal fails and is dismissed.

*Appeal dismissed.*

Solicitors: *Hepworth & Chadwick, Leeds; Director of Public Prosecutions.*

J. F. L.

# AMON *v.* RAPHAEL TUCK & SONS LTD.

1955
*Nov.* 10, 23;
*Dec.* 7, 19.

Devlin J.

[1955 A. No. 1298.]

*Practice and Procedure—Parties—Joinder—Application by defendants to add further defendant—Allegation by plaintiff that confidential information made use of in design of a pen—Claim by plaintiff for injunction restraining defendants from making use of information —Claim by third person to be inventor of defendants' pen—Third person's claim to be entitled to minimum royalty from defendants on sales of pen—Whether third person a "necessary" party to the action—R.S.C., Ord.* 16, *r.* 11.

Defendants applied under R.S.C., Ord. 16, r. 11, for an order that one D. be joined as defendant in an action. In the action the plaintiff alleged that he was the inventor of a certain design, known as the "Fastik" design, for a pen, details of which he had imparted in confidence to the defendants under an agreement, and that the defendants, in breach of a duty owed to him, had disclosed the design to other persons and had made use of his information in deriving from it a competing design, the "Stixit" design, for a pen which they had advertised and canvassed to the retail trade, and he claimed damages for breach of contract and an injunction restraining the defendants from making use of the information without his consent. D. alleged that he was the inventor of the "Stixit" pen; that it was that design from which the plaintiff had obtained his invention of the "Fastik" pen; that he had entered the defendants' employment for the purpose of assisting them to market the "Stixit" pen and that there was an agreement between him and the defendants under which he was entitled to a royaltv or commission on the sales of the "Stixit" pen and which provided for the payment to him of a minimum annual royalty; D. further alleged that the agreement contained an express clause requiring the defendants to undertake the manufacture and distribution of the "Stixit" pen in certain territories. D. was willing to be made a defendant so that he could counterclaim against the plaintiff, but the plaintiff denied the allegations of D. and objected to the joinder:—

*Held*, that the application was, in effect, an application for leave to intervene against the will of the plaintiff; that in such a case the appropriate test to determine whether the intervener was a party "who ought to have been joined, or whose presence "before the court may be necessary" to enable the court completely and effectually to adjudicate upon and settle all the questions involved in the cause or matter within Ord. 16, r. 11, was: Would the order for which the plaintiff was asking directly affect the intervener, not in his commercial interests, but in the enjoyment of his legal rights? Applying that test, D. was within the rule, for the injunction sought by the plaintiff in effect would restrain the further manufacture of the "Stixit" pen and therefore, although the fact that D. was entitled to a royalty or commission gave him only a commercial interest in the continued manufacture, if he could show that the defendants were by contract obliged to manufacture a reasonable quantity of "Stixit" pens he would have a right of action against them if they did not do so, and might ask in a subsequent action for specific performance of an agreement which the court had ordered not to be performed. The court accordingly had jurisdiction to make the order sought which, in the circumstances was one which it was proper that the court in its discretion should make.

*Per* Devlin J. I do not agree that the main object of the rule is to prevent multiplicity of actions, though it may incidentally have that effect. The primary object of the rule I believe to be to replace the plea in abatement. The words of the rule which I have to construe do not represent any addition to the powers of the court initiated by the Judicature Acts, and I do not think that the necessary parties contemplated by it are other than those who would have been considered by a court of equity to be necessary before the passing of the Judicature Acts. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party.

CHAMBERS SUMMONS.

The plaintiff, Robert Amon, issued a writ claiming against the defendants, Raphael Tuck & Sons Ltd., (*a*) damages for breach of agreements to treat as confidential information disclosed by him to the defendants relating to his design of an adhesive dispenser; (*b*) damages for breach of duty owed by the defendants not to disclose to other persons or to make use of the information; and (*c*) an injunction restraining the defendants from disclosing to other persons or making use of the information without his consent.

By his statement of claim he alleged that he was the inventor of a new and distinctive design, the "Fastik" design, for an adhesive dispenser pen in respect of which a certificate of registered design dated February 23, 1954, was issued under the Registered Designs Act, 1949, details of which he had disclosed to the defendants; that in the circumstances the defendants owed him a duty not to disclose or to make use of the information as to the "Fastik" design; that, in breach of that duty, the defendants had made use of the "Fastik" design in deriving therefrom a competing design, the "Stixit" design, and had widely advertised, canvassed to the retail trade, and manufactured and threatened and intended to continue to do so, and to market, refills designed according to the "Stixit" design; and that, as a result of the defendants' conduct he had been forced to reduce the price of his refill.

The defendants applied to the master under R.S.C., Ord. 16, r. 11,[1] for an order that one Hugo Dachinger, who claimed to be the inventor of the "Stixit" design and alleged that the "Fastik" design was an embodiment of his invention made by the plaintiff in breach of confidence, should be joined as defendant. The plaintiff objected to the joinder and Master Harwood refused to order it. The defendants appealed, and Devlin J. adjourned the hearing into open court.

The facts are more fully stated in the judgment.

*Guy Aldous* for the defendants.
*E. V. Falk* for the plaintiff.

Such of the argument as took place in open court is set out in the judgment.

*Cur. adv. vult.*

Dec. 19. DEVLIN J. read the following judgment: The plaintiff alleges in his statement of claim that he is the inventor of an adhesive dispenser in the shape of a pen which he calls the "Fastik" pen and in respect of which he has filed an application for a provisional patent. He alleges that in August, 1953, he was in negotiation with the defendants with the object of arriving at an agreement under which they were to market the pen and that in the course of the negotiations he disclosed the "know-"how" of his pen. On February 22, 1954, the negotiations broke down. The plaintiff now finds, he says, that the defendants are manufacturing a pen which they call the "Stixit" pen and which contains three distinctive features of the "Fastik" pen. In short, he claims that the defendants have stolen his know-how. In legal language, he says that there was an implied contract that the defendants would treat as confidential the information given to them during the negotiations and that they are in breach of that contract.

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[1] R.S.C., Ord. 16, r. 11: " . . . "The court or a judge may, at any "stage of the proceedings, either upon "or without the application of either "party, and on such terms as may "appear to the court or a judge to "be just, order that . . . the names "of any parties, whether plaintiffs or "defendants, who ought to have been "joined, or whose presence before the "court may be necessary in order to "enable the court effectually and "completely to adjudicate upon and "settle all the questions involved in "the cause or matter, be added. . . ."

The statement of claim was delivered on June 1, 1955. Before delivering a defence the defendants applied to the master for an order under R.S.C., Ord. 16, r. 11, that one Dachinger should be joined as a defendant. They filed an affidavit by him in which he expresses his willingness to be joined. He says in effect that he is the inventor of the " Stixit " pen, that he is in the employment of the defendants and is assisting them in marketing the pen. He also in his affidavit gave an account of the negotiations in August, 1953, very different from that set out in the statement of claim. He says that he came to England in April, 1953, and was introduced to the plaintiff and disclosed to him confidentially his invention. According to him, the negotiations to which the plaintiff has referred took place between himself and the defendants with the plaintiff acting as an intermediary. The " Fastik " pen is, he says, an embodiment of his invention and made by the plaintiff in breach of confidence; and he wished to be made a defendant so that he could counterclaim against the plaintiff.

The plaintiff objected to the joinder and the master refused to order it; against this refusal the defendants now appeal. The master refused because he decided that he had no jurisdiction to make the order, and at the first hearing before me Mr. Falk supported the master's decision solely on that ground. He said, however, that he wished to contend in the alternative that if the court had jurisdiction, this is not a case in which its discretion should be exercised. For this purpose he had filed some further affidavits which the defendants had not then had time to consider and answer. In these circumstances he asked that I should deal first with his submission on jurisdiction. This is not usually the convenient course, but as a special appointment had been made for the hearing of the summons it seemed to me on the whole the best one to take.

The material words of rule 11 are those which give power to the court to order " that the names of any parties, whether plain-" tiffs or defendants, who ought to have been joined, or whose " presence before the court may be necessary in order to enable " the court effectually and completely to adjudicate upon and " settle all the questions involved in the cause or matter, be " added."

I found it necessary to go very fully into the cases, for it is not easy to select any one of them which lays down authoritatively and comprehensively how the rule is to be applied. There are two views about its scope; and authority can be cited for both. One is that it gives a wide power to the court to join any party who has a claim which relates to the subject-matter of the action. This is the construction contended for by the defendants and, if it is right, it really kills any submission about jurisdiction. The court is hardly likely in the exercise of its discretion to join as a party somebody who has no claim relating to the subject-matter of the action; and if its powers extend to joining anyone who has, the question of whether a particular intervener should be joined becomes virtually one of discretion.

The plaintiff, on the other hand, contends that the power given by the rule is hedged about with limitations which are to be found in the decided cases. These cases, he submitted, do not merely set out principles on which the discretion should be exercised, but place limits on the jurisdiction, and in some of them the court says so expressly. The most comprehensive statement of them is contained in a note in the White Book under Ord. 16, r. 1 (1955 ed.), p. 232.

After considering my judgment I reached the provisional conclusion that the narrower construction for which the plaintiff contended was the right one and, accordingly, that the appeal should fail. But as I had been led to read one or two important authorities that had not been cited to me in argument, I thought it right that I should invite counsels' comments upon them; and also thought it convenient, since a further hearing would in any event be necessary, that all the relevant material, whether it went to jurisdiction or to discretion, should be put in.

The further material suggests that the facts are—at any rate to one not versed in patent matters—almost as complicated as the law. A great deal of correspondence has now been put in and I wish to say no more about it than is strictly necessary for the determination of this summons. The plaintiff says that this case is concerned with three pens, the pen he invented, which I have called the " Fastik " pen; a pen which Mr. Dachinger invented, which I shall call the " Dachinger " pen; and the pen which the defendants are manufacturing, which I have called the " Stixit " pen and which the plaintiff alleges incorporates features from the " Fastik " pen as well as from the " Dachinger." Mr. Falk submits that there were two sets of negotiations going on simultaneously. One was between the plaintiff and the defendants relating to the " Fastik " pen, and this gave rise to the relationship of confidence which is the subject-matter of the action. The

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other set was in relation to the "Dachinger" pen. In this set the plaintiff and the defendants were acting as joint principals dealing together with Mr. Dachinger, and this matter, Mr. Falk submits, has nothing to do with the present action.

The case for the defendants and Mr. Dachinger is that there was only one pen from start to finish; and that the only negotiations were in relation to that pen which the defendants are now manufacturing as the "Stixit" pen. A defence has now been put in in which it is alleged that in these negotiations the plaintiff acted simply as agent for Mr. Dachinger or as an intermediary, and that any duty of confidence which there might be was owed to Mr. Dachinger and not to the plaintiff. Mr. Dachinger also made a further affidavit in which he set out the terms of an agreement made between the defendants and himself for the marketing of his invention.

I derived a great deal of assistance from the observations of counsel on the further authorities to which I drew their attention and was, I think, enabled to understand them better than I had previously done. Nevertheless, I remained of the opinion that the narrower construction was the right one; and if that had remained the only point taken by Mr. Aldous the appeal would have failed. But Mr. Aldous also submitted in the alternative that upon the narrower construction he was entitled to succeed; and to bring himself within it he relied upon the facts disclosed in Mr. Dachinger's further affidavit. I have now reached the conclusion that Mr. Aldous's alternative submission is the right one and that the appeal succeeds. I have been very tempted, therefore, to curtail my judgment by declining to decide which of the two constructions is right, and by merely setting out my reasons for thinking that on the construction which is the less favourable to them the defendants are entitled to succeed. I have, however, in the end not found it desirable to take this course. In the first place, Mr. Falk in his original argument put his points in a number of different ways and, as I cannot now decide the case simply by accepting one of his points, I shall have to deal fully with his argument, and that involves dealing generally with the meaning and effect of the rule. In the second place, in permitting it to cover the present case I have perhaps extended the narrower construction a little further than it has so far gone, and I cannot justify that without considering the cases in which it has been elaborated. Finally, the question of the costs of this interlocutory matter must now be becoming of some importance. When I come to consider that question I shall have to have regard to my view that on the material before him the master's decision was the right one and it is desirable, therefore, that I should state my reasons for that conclusion.

Accordingly, I shall begin my judgment by considering the case for the narrow construction of the rule and Mr. Falk's arguments thereon. I have already set out the material parts of the rule which requires that the party to be joined must be one "whose presence before the court may be necessary in order to "enable the court effectually and completely to adjudicate upon "and settle all the questions involved in the cause or matter." This is in form an application by the defendants to join Mr. Dachinger. But in my judgment they cannot show that, so far as they are concerned, Mr. Dachinger is a necessary party to the action. They are sued by the plaintiff simply for breach of confidence, and the essence of their case is that they owed no duty to him. On this issue they will no doubt require to have Mr. Dachinger as a witness on their behalf, and it may be convenient to them to have him as a party, but it cannot be said that it is necessary to their case that he should be a party. The application must, therefore, be treated as an application by Mr. Dachinger for leave to intervene. As I have said, the authorities which relate to the application of the rule to propose interveners are quoted in a note in the White Book (1955 ed., p. 232), and the material parts of it are as follows: "Generally "in common law and Chancery matters a plaintiff who conceives "that he has a cause of action against a defendant is entitled "to pursue his remedy against that defendant alone. He cannot "be compelled to proceed against other persons whom he has no "desire to sue. . . . Generally speaking, intervention can only "be insisted upon in three classes of case, namely: (A) In a "representative action where the intervener is one of a class "whom plaintiff claims to represent," but who denies that the plaintiff does in fact represent him; "(B) Where the proprietary rights of the intervener are directly affected by the "proceedings," and "(C) In actions claiming the specific performance of contracts where third persons have an interest in the "question of the manner in which the contract should be "performed."

Mr. Falk's first submission is that there is no jurisdiction to join an intervener if the plaintiff has no claim against him and does not desire to prosecute any. He relied strongly on the recent decision in *Atid Navigation Co. Ltd.* v. *Fairplay Towage and*

*Shipping Co. Ltd.*,[1] in which Wynn-Parry J. said[2]: "After all, "the basis of the whole jurisdiction to add defendants is that "there is a cause of action by the plaintiff against not only the "existing defendant but the person who would be joined if the "application were successful. In *Norris* v. *Beazley*[3] Lord "Coleridge C.J., after referring to Ord. 16, r. 13, as it then "stood, said: 'It seems to me to be correctly argued that those "'words plainly imply that the defendant to be added must be "'a defendant against whom the plaintiff has some cause of "'complaint, which ought to be determined in the action, and that "'it was never intended to apply where the person to be added as "'defendant is a person against whom the plaintiff has no claim, "'and does not desire to prosecute any.'" Wynn-Parry J., having quoted this passage, then expresses his own conclusion: "I hold, therefore, that I have no jurisdiction to make the order "asked for."

Several earlier cases were referred to. *McCheane* v. *Gyles* (*No.* 2)[4] was an action in which a beneficiary charged one of several trustees with a breach of trust and the defendant applied to have the executrix of a co-trustee joined as a co-defendant. Buckley J. refused to make the order and, according to the headnote, he held that she ought not to be added as a defendant against the plaintiff's wish. I think that this condenses the judgment too much. Buckley J.[5] certainly referred to "a class of "cases . . . in which a person may be added as a defendant to "an action without the plaintiff's consent" and held that this was not one of them. He did, I think, also decide the case as a question of jurisdiction and not of discretion, because he said at the beginning of his judgment that he would have made the order asked for if he could and[6] that he had not power to make it. But I think that the precise ground for his holding that he had no jurisdiction is expressed a little higher up where he says[6] "her presence is not necessary to enable the court to decide "whether Gyles is liable for a breach of trust." That is rather a different point which I shall consider later.

In *Hood Barrs* v. *Frampton, Knight & Clayton*,[7] the plaintiffs employed the defendants to collect on their behalf the rents of a certain flat. After a while they refused to pay them over because they had been informed by a third party that she was entitled to receive them. The plaintiffs sued the defendants who asked for the other party to be joined. Eve J. refused the application and said that the defendants had no right to require the plaintiffs to sue another party: convenient as it no doubt would be to have the whole matter discussed, they could not claim to have it decided on the record as it stood, and he declined to make the order for adding a defendant against whom no relief was sought. Here, again, I do not think that the gist of the judge's decision was that he had no jurisdiction to make the order in a case where the plaintiffs sought no relief; I think the true effect of it is that the defendants were not entitled to have the other party joined because the question involved did not arise on the record as it stood.

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[1] [1955] 1 W.L.R. 336; [1955] 1 All E.R. 698.

[2] [1955] 1 W.L.R. 336, 338.

[3] (1877) 2 C.P.D. 80, 83, 84.

[4] [1902] 1 Ch. 911.

[5] Ibid. 915.

[6] Ibid. 917.

[7] [1924] W.N. 287.

But these cases show that the judges felt the difficulty of joining as defendant a party whom the plaintiff said he did not want to sue. Buckley J. said in the course of the argument in *McCheane* v. *Gyles* (*No.* 2)[8]: "Supposing I did so, how could I "make him allege anything against or claim anything from the "new defendant?" In his judgment he pointed out that if the party were joined and the plaintiff made no allegation against her she might apply to be dismissed from the action. In some cases it may be apparent from the statement of claim that the plaintiff must have a cause of action against the intervener as well as the defendant. In others it may be apparent from admitted facts that he has a good cause of action. But suppose upon the facts which the plaintiff is going to prove he would have no cause of action against the intervener, can the intervener be joined? Or suppose that the plaintiff has not on any view a cause of action against the intervener, can he still be joined? Lord Coleridge C.J. in *Norris* v. *Beazley*[9] thought not. His reference to the rule in the passage cited by Wynn-Parry J. is a reference to the last sentence of it which now reads: "Every party whose name is so added "as defendant shall be served with a writ of summons or notice "in manner hereinafter mentioned." The present rule 13 orders that where a defendant is added the writ of summons shall be amended and the plaintiff shall serve the new defendant with the amended writ or with notice thereof in the same manner as original defendants are served, and the proceedings shall be continued as if the new defendant had originally been made a defendant. This seems to contemplate that the plaintiff must show a good cause of action on the amended writ and must deliver a statement of claim in amplification of it. The willing intervener

[8] [1902] 1 Ch. 911, 913.

[9] 2 C.P.D. 80, 82.

might dispense with this; but the rule is the same for the willing and the unwilling, and the unwilling, as Buckley J. pointed out,[10] could immediately apply to have his name struck out if the writ and statement of claim disclosed no cause of action against him.

Nevertheless, later authorities, which are binding on me, show conclusively that a party can be joined as defendant even though the plaintiff does not think he has any cause of action against him. In *Montgomery* v. *Foy, Morgan & Co.*[11] the plaintiff carried cargo to London consigned to the defendant; the defendant was the agent of the shipper to sell the goods in England and had no right of property in the cargo. As the defendant did not take delivery, the plaintiff placed it in the custody of a warehouseman with a notice that it was subject to a lien for freight under the Merchant Shipping Act, 1894, s. 493. The defendant obtained possession of the cargo under section 495 by depositing the amount claimed for the freight with the warehouseman and giving him notice to retain it under section 496 as he did not admit any sum to be payable. The plaintiff brought an action against the defendant for a declaration that he was entitled to a lien on the deposit and an order that the sum should be paid to him. The intervener as owner of the cargo had a claim for short delivery and damage to the cargo and applied to be joined as defendant so that he could counterclaim. This was allowed by the Court of Appeal. Lord Esher M.R.[12] said, with regard to *Norris* v. *Beazley*,[13] that while he did not say that the actual decision was wrong, he did not think all the statements made in the judgments could now be supported. In this case the plaintiff was in substance suing the intervener because he was the person, as Lord Esher M.R. said,[14] who made the contract of affreightment and out of whose pocket the freight came. But he was not suing him in form and it does not appear that the Court of Appeal thought it necessary that he should.

In *Norbury, Natzio & Co. Ltd.* v. *Griffiths*[15] the defendant and the intervener as executors sold a printing business to the plaintiffs. One of the terms of the contract was that the plaintiffs should complete work in progress at the time of the sale at agreed rates. The plaintiffs alleged that by a special arrangement made with the defendant only they printed a catalogue at a special rate different from the agreed rate and they sued him for the cost. The defendant admitted that the sum was due but denied that it was due under a special arrangement to which he alone was a party; he said that the work was not done for him separately but for himself and the intervener as executors. If the case had stopped there, the defendant need not have applied for the joinder; if the defendant was successful in proving that the contract was a joint one, it would be the plaintiff who would have to ask for the joinder. But the defendant also said that there were other sums due to himself and the intervener as executors under the contract of sale and for which he wanted to counterclaim; he could not do that without joining the intervener on the counterclaim and so he applied to have the intervener joined as a defendant. The Court of Appeal allowed the joinder, saying in effect that it did not matter that the plaintiff was not suing on a joint contract and that it was not necessary for the court to determine whether there was or was not a joint contract; the joinder was justified if the defendant could show a prima facie case of joint contract. The form of the order made is set out.[16] It is not quite clear from it whether the plaintiff was required to frame a cause of action against the intervener or not. It rather looks as if he was not, for the order says that he is to be joined as a co-defendant, and that the defendants be then at liberty to bring a counterclaim jointly against the plaintiffs.

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[10] [1902] 1 Ch. 911, 917.

[11] [1895] 2 Q.B. 321; 11 T.L.R. 512.

[12] [1895] 2 Q.B. 321, 325.

[13] 2 C.P.D. 80.

[14] [1895] 2 Q.B. 321, 323.

[15] [1918] 2 K.B. 369.

Finally, in *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.*,[17] Evershed J. held in terms that it was unnecessary that the plaintiffs should have any cause of action. In this case the plaintiffs' registered trade mark consisted of the word "Bentley." In 1932 they agreed with Mr. Bentley, who was apparently leaving their employment, that notwithstanding the registration of the trade mark he might permit the use of his name by any company who employed him. He was employed by the defendants. The plaintiffs sued the defendants claiming an injunction for infringement of their trade mark. The defendants challenged the validity of the trade mark and also relied on the contract of 1932. Mr. Bentley sought to intervene on the ground that the plaintiffs were acting in breach of his contract. Evershed J. allowed the joinder and said[18] at the end of his judgment that it did not matter if the plaintiffs in the action did not prefer any claim against the party joined and that the practical effect of the joinder is so that the party joined may assert his case by way of counterclaim against the plaintiffs.

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[16] [1918] 2 K.B. 369, 380.

[17] [1945] 2 All E.R. 211.

[18] Ibid. 213.

The decisions in the Court of Appeal make it clear that it is no bar to an intervention that the plaintiff cannot on his view of the facts formulate any cause of action against the intervener. The decision in *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.*[19] may go further and support a submission that it is not necessary that on any view of the facts a cause of action should be shown. *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.*[19] was apparently not cited to Wynn-Parry J. in *Atid Navigation Co. Ltd.* v. *Fairplay Towage and Shipping Co. Ltd.*,[20] and I think that it is convenient that I should consider again the dicta on which Mr. Falk relies after I have expressed my view about the construction of the rule.

I shall take the same course with Mr. Falk's second submission, namely, that there is no jurisdiction to make the order in a case in which the sole purpose of the intervention is to advance a counterclaim. Here, again, Mr. Falk relies on a sentence in the judgment of Wynn-Parry J. which comes just before the passage I have already cited. The judge says[21]: "I know of no authority which goes so far as saying that the "court would make an order, as asked in this case, merely to "enable the proposed interveners to join with the existing "defendants in prosecuting a counterclaim."

The question of jurisdiction must depend on the meaning and scope of the rule. One cannot say that the court has no power to join a party against whom the plaintiff has no cause of action, unless the requirement that he should have one is contained expressly or impliedly in the rule. Nor can one say that some counterclaims, such as that in *Montgomery* v. *Foy, Morgan & Co.*,[22] are permissible, and that others, such as that in *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.*[23] are not, unless the line between them is drawn somewhere in the rule. Accordingly, the present case, in my view, really turns upon the true construction of the rule, and in particular the meaning of the words "whose presence before the court may be necessary in order to "enable the court effectually and completely to adjudicate upon "and settle all the questions involved in the cause or matter." The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose.

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[19] [1945] 2 All E.R. 211.

[20] [1955] 1 W.L.R. 336.

[21] Ibid. 338.

[22] [1895] 2 Q.B. 321.

[23] [1945] 2 All E.R. 211.

It is not, I think, disputed that "the cause or matter" is the action as it stands between the existing parties. If it were otherwise, then anybody who showed a cause of action against either a plaintiff or defendant could, of course, say that the question involved in his cause of action could not be settled unless he was made a party. Mr. Aldous does not contend for so wide a construction as that. But he submits that if the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the court has power to join the intervener so as to give effect to the primary object of the order, which is to avoid multiplicity of actions. In the present case he submits that the subject-matter of the dispute between the existing parties is the "ownership," if I may so put it, of an invention; the plaintiff claims that he is the owner of it and the intervener alleges that he is, and both disputes ought to be determined at the same time. This construction stresses the amplitude of the closing words "all the questions "involved in the cause or matter."

The alternative construction treats the opening words as dominant. "All the questions involved" is a phrase that, unless it is cut down, would be impossibly wide. It is cut down, the plaintiff submits, by the opening words. The intervener must be a party whose presence is necessary to enable all questions in the action to be adjudicated upon and settled, but the question must be one which has to be adjudicated upon in the issue between the existing parties and not in any new issue raised by an intervener.

The criticism that at once suggests itself of this construction is that it is impossibly narrow. If the adjudication is limited to something that lies between the plaintiff and the defendant, what parties can be necessary to it except the plaintiff and the defendant? The court is for this purpose concerned only with actions in personam, and in such actions either the necessary defendant is sued or the action fails. If all the parties who "ought to have "been joined" under the first limb of the rule are joined, who are the "necessary" parties contemplated by the second limb?

It is true that in actions in personam the order that the court makes is binding only on the parties. But there is, nevertheless, a distinction between those orders that were formerly made by the courts of common law and those that were made by a court of equity. When a court orders a defendant to pay damages, no other person is, as a rule, legally affected by the order. Someone else may be commercially affected, because if there is a similar cause of action pending against him, he may have good reason to think that another court may make him liable to pay damages in another action. Nevertheless, until that other action is decided his legal rights are unimpaired.

But when a man is ordered to do or refrain from doing something, the legal repercussions are far wider. A plaintiff may, for example, claim that goods held by a warehouseman are his goods and may obtain an injunction to prevent the warehouseman from parting with them. Suppose that a third party says that the goods are his. It is true that he is not in law bound by the order against the warehouseman, but in practice he would not be able to get possession of them. So long as the order stands, he cannot effectually exercise his legal right. It is in this way, I think, that the three classes enumerated in the White Book have been developed. Let me take first the third class, the case of a contract for specific performance, because it illustrates the point most clearly. In *Dix* v. *Great Western Railway Co.*[24] the railway company entered into three separate agreements with three separate covenantees to make a road for their use. One of them sued the company for specific performance. But if the court made an order for specific performance at the instance of one covenantee only, what would happen? The others might come along later and say that they had quite different ideas about the way in which the contract should be performed. As Kay J. said[25]: "They might entertain different views from the "plaintiff as to the line of road." If they were not allowed to intervene, then an order might be made, which, although not in strictness binding upon them, could seriously and directly affect their rights because the railway company might claim that it was bound to perform the contract in a way which injured them. The court can make only one order for specific performance; it cannot order a contract to be performed in three different ways. Accordingly, it could not completely and effectually settle the question involved in the action between Mr. Dix and the railway company unless it made one order binding on all the parties who were interested in the subject-matter of that action, namely, the performance of the contract.

The same principle is illustrated by those cases which have been decided in relation to proprietary rights. It is not the bare fact that the intervener has proprietary rights that matters. It is the fact that an order in the nature of an injunction may be made which affects his rights. In *Vavasseur* v. *Krupp*[26] the plaintiff complained that Krupps had infringed his patent for making shells. Some of the shells were in England awaiting delivery to the Government of Japan. The plaintiff obtained an injunction against the owners of the wharf and against the agents of the purchaser, the Japanese Government, restraining them from delivering the shells to the Government. The Mikado was allowed to be added as a defendant. The injunction clearly impaired the exercise of his legal rights. I do not think it matters whether or not they are called proprietary rights. His rights would be equally affected if his power to require his agent to obey his instructions was met with the answer that the agent was prohibited by an order of the court from doing so. *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*[27] was a case of the same sort, except that the Governments who wanted to intervene did not (see page 42) assert a right of property in the gold bars they had deposited with the bank. But an injunction against the bank would have interfered with their right against the bank to call for delivery, and they were allowed to intervene.

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[24] (1886) 34 W.R. 712.

[25] 34 W.R. 712.

The remaining class of those enumerated in the White Book is that of the representative action where the intervener says that he is not truly represented. The order made in the action will not merely affect the intervener's rights, but may settle them conclusively. This type of case is, therefore, in accordance with the principle I have been considering, and is indeed a fortiori, so that I need not do more than allude to it.

If this is the line of authority that is the correct one to apply, then I think the test is: "May the order for which the plaintiff "is asking directly affect the intervener in the enjoyment of his "legal right?" It is not, on this view, enough that the plaintiff's rights and the rights which the intervener wishes to assert should be connected with the same subject-matter. Nor is it enough that the intervener's commercial interests may be affected by an order made in the action. This distinction between legal and commercial interests appears to be sharply drawn in the decision of the Court of Appeal in *Moser* v. *Marsden*,[28] on which Mr. Falk strongly relies. In that case the defendant used in England a machine which had been manufactured by the intervener in Prussia under a patent that he had obtained in that country. The plaintiff alleged that the machine infringed his English patent and brought an action to restrain the defendant from using it. The intervener disputed the plaintiff's contention and there was manifestly only one subject-matter out of which the two disputes arose. Nevertheless, the Court of Appeal reversed the order of the Vice-Chancellor, who had allowed the intervention, and said that it was a question of jurisdiction and not of discretion. Mr. Aldous has subjected the case to a close analysis, as a result of which he submits that the joinder could not have been made anyway because the plaintiff had no cause of action against the intervener, and the intervener had no cause of action against the plaintiff. The plaintiff, Mr. Aldous says, could not have sued the intervener because the machine had been manufactured abroad: the intervener could not sue the plaintiff because the only relief obtainable would be by way of declaration and until 1949 a declaratory judgment in this form of action was not permitted. It appears that the intervener wanted to undertake the defence of the action but the defendant would not let him, and Mr. Aldous submits that the only object of the application was so that the intervener could see that the action was defended properly. I confess that I do not know the answer to Mr. Aldous's point and I do not propose to add to the burdens I have already undertaken the additional one of investigating how the English patent law stood in the year 1892. Whether Mr. Aldous's point is a sound one or not, it is not the point that was argued in the case nor that upon which the court proceeded. The decision, as expressed in the judgments, is a stringent and very precise application of what I have called the narrower construction of the rule. The plaintiff was seeking an injunction to restrain the defendant from using a machine manufactured by the intervener. But it was not the intervener's machine but merely his invention; the defendant was not his agent; the intervener had no legal right which would be impaired if the defendant stopped using the machine. Lindley L.J., with whose judgment Kay L.J. entirely concurred, said [29] that the only question involved in the action was whether what the defendant was doing was an infringement of the plaintiff's patent. A judgment to that effect might affect the intervener commercially, but would not affect him legally. Kay L.J. said [30] that judgment in the action would not bind the intervener; it might affect him indirectly and commercially, but not directly.

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[26] (1878) 9 Ch.D. 351.

[27] [1951] Ch. 33; 66 T.L.R. (Pt. 2) 559; [1950] 2 All E.R. 605.

[28] [1892] 1 Ch. 487.

The case which the advocates of the narrower construction find most difficult to fit in with it is *Montgomery* v. *Foy, Morgan*

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[29] [1892] 1 Ch. 487, 489.

[30] Ibid. 491.

*& Co.*,[31] which I have already considered in another connexion; it was the case in which the shipowner was claiming freight deposited under the Merchant Shipping Act, 1894. The case can be brought within the narrower construction by treating the deposit as in substance the property of the intervener. The plaintiff was seeking to take the deposit in satisfaction of his claim to freight and the intervener was seeking to retain part of it to satisfy his counterclaim for damages. The deposit represented the cargo on which the plaintiff had had a lien, and there can be no doubt that an order enforcing a lien on the cargo directly affects the cargo owner.

Dicta can be cited from all the judgments to support this view of the case. Lord Esher M.R. said[32]: "The plaintiff "claims the whole amount deposited in respect of the freight; "but the amount to which he is entitled may be diminished by "his being liable to pay to the defendants whom it is sought to "add damages for breach of the same contract under which the "freight is claimed." Kay L.J. said[33] that the question raised by the counterclaim must be determined in order to determine the question of what amount the plaintiff was entitled to receive in respect of his freight. A. L. Smith L.J. said[34]: ". . . the "real question involved is what amount, if any, the shipowner "is entitled to receive from the shippers for having brought the "goods to this country when the disputes between them are "adjusted." Buckley J. in *McCheane* v. *Gyles* (*No.* 2)[35] said that the ratio decidendi in *Montgomery* v. *Foy, Morgan & Co.*[36] was "that in the question what the plaintiff was entitled to "receive out of the deposit there was involved the question "whether he owed anything to the shippers." But there are also dicta to support the wider construction. Lord Esher M.R. said[37]: "Here the matter before the court is the contract of "affreightment, and there are disputes arising out of that matter as "between the plaintiff and the defendants and [the intervener] ". . . where there is one subject-matter out of which several "disputes arise, all parties may be brought before the court, and "all those disputes may be determined at the same time. . . ." A. L. Smith L.J. said,[38] in effect, that there was jurisdiction because the whole matters in dispute arose under the one contract of affreightment.

[31] [1895] 2 Q.B. 321.
[32] Ibid. 324.
[33] Ibid. 326.
[34] Ibid. 328.
[35] [1902] 1 Ch. 911, 917.
[36] [1895] 2 Q.B. 321.
[37] Ibid. 324.
[38] Ibid. 328.

*Byrne* v. *Brown*[39] was an unusual case in its facts. The plaintiff let certain premises to Mrs. Brown. Mrs. Brown allowed a Mr. Diplock to go into possession under an arrangement whereby he paid her the rent and indemnified her against any breach of covenant. The plaintiff, on the expiry of the lease, brought an action for dilapidations for breach of covenant to repair. If the action had been brought in Mrs. Brown's lifetime, she would have been the defendant and would doubtless have joined Diplock as third party and there would have been no difficulty. But before the lease expired she was dead and her executors in the distribution of her estate had executed an assignment of the lease to her son, Stanley Brown. So the plaintiff sued the son and he brought in Diplock as third party, but a doubt arose about whether Diplock was liable to indemnify the son; he had contracted with the mother but not with the son. The son therefore asked to have Mrs. Brown's executors joined as defendants and the plaintiff had no objection; the object was, of course, so that the executors should make Diplock a third party and thus deprive him of his technical answer that there was no privity between him and the son. The application was allowed by the official referee who was trying the case, but refused on appeal to the Divisional Court by Denman and Stephen JJ., who thought that the principle in *Norris* v. *Beazley*[40] prevented them from making the order. The Court of Appeal (Lord Esher M.R. and Bowen and Fry L.JJ.) allowed the appeal. It is not quite clear upon what ground the Court of Appeal proceeded. One ground, which certainly was a sufficient ground and may have been the sole ground, was that the defendant as third party had no right to object. As Bowen L.J. put it,[41] if the plaintiffs had applied to have their statement of claim amended by adding the new defendants, the third party could have made no valid objection. In truth, he was not directly affected by the order; he might be affected in the sense that the new defendants, when joined, were expected to take some action against him, but that would be an indirect consequence. As all the Lords Justices put it, he was not in the legal sense hurt or injured by the order.

If that was all that had been said, the case would not be material to the point I am considering. But Lord Esher M.R. dealt with the object of the rule. He said[42]: "One of the chief

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[39] (1889) 22 Q.B.D. 657; 5 T.L.R. 255.

[40] 2 C.P.D. 80.

[41] 22 Q.B.D. 657, 669.

[42] Ibid. 666.

"objects of the Judicature Acts was to secure that, whenever a "court can see in the transaction brought before it that the "rights of one of the parties will or may be so affected that under "the forms of law other actions may be brought in respect of that "transaction, the court shall have power to bring all the parties "before it, and determine the rights of all in one proceeding. It "is not necessary that the evidence in the issues raised by the "new parties being brought in should be exactly the same; it is "sufficient if the main evidence, and the main inquiry, will be "the same, and the court then has power to bring in the new "parties, and to adjudicate in one proceeding upon the rights of "all the parties before it. Another great object was to diminish "the cost of litigation. That being so, the court ought to give "the largest construction to those Acts in order to carry out as "far as possible the two objects I have mentioned. Applying "those general observations to this case: the transaction here is "in respect of a lease and a claim for dilapidations under it. The "lease has been in various hands; contracts have been made with "regard to it; and it is obvious that there are various persons "whose rights and liabilities will be, or may be, affected by the "determination of the claim for dilapidations. The plaintiffs are "the original lessors; one of the defendants is an assignee of the "term. The proposed new defendants are executors of the will "of the original lessee. It seems to me obvious that the rights "and liabilities of all those parties may be affected by what has "been done with respect to the lease and the dilapidations." Bowen L.J. put his judgment on the other ground, but at the end of it he said[43]: "I agree with what the Master of the Rolls "said with respect to the objects of the Judicature Acts." Fry L.J. concurred in the judgment of Bowen L.J. It would perhaps be over meticulous to point out that Bowen L.J., while agreeing with the general statement on the objects of the Judicature Acts generally, did not expressly agree to the application of what Lord Esher M.R. called "those general observations" to the facts of the case.

Finally, there is the decision of Evershed J. in *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.*[44] I have already set out the facts. Mr. Falk has subjected this decision to careful analysis and submits that it can be justified on two grounds neither of which are harmful to his contention. He points out that the defendants were being sued for infringement of the plaintiff's registered trade mark and that they were in fact using the trade mark. Their defence (apart from the issue on validity) was that they were using it with the authority of the intervener who had acquired by contract from the plaintiffs the right so to authorize them: but the judge expressly held that the defendants were not entitled to rely on the intervener's contract with the plaintiffs, and therefore it was necessary to the defence that they should have the intervener in as a co-defendant and so he was properly joined on that ground. There seems to me to be in this argument a confusion of thought. Either the authorization given by the intervener provided the defendants with a good defence or it did not; if it did, then the defendants could surely prove the authorization together with the intervener's own authority to give it without bringing the intervener in as a party; if it did not, then bringing the intervener in would not help. In other words, a defence of this character is not one which, if bad in itself, could be cured by the presence of another defendant. I think it is plain from the passage [45] in the judgment of Evershed J., which I cite below, that he was not being invited to consider the matter from the defendants' point of view, but was being asked to say whether the intervener had established a right to intervene.

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[43] 22 Q.B.D. 657, 669.

[44] [1945] 2 All E.R. 211.

Alternatively, Mr. Falk submits that the case comes within the narrower construction of the rule, because the intervener's legal rights would have been affected by the order for which the plaintiffs were asking. The intervener had a contract of employment with the defendants under which he permitted the defendants to use the trade mark; if the plaintiffs obtained an injunction restraining the defendants from using the trade mark, then the contractual relations between the intervener and the defendants would be affected. I cannot find, however, that these contractual relations were ever gone into. As in *Moser* v. *Marsden*,[46] I prefer to have regard to the points that were argued at the time and to the reasons which the judges gave for their decisions rather than to those which the ingenuity of counsel undertaking legal post-mortems may now be able to construct. The reason for the decision of Evershed J. in *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.*[47] is expressed as follows [48]: "The "question on this summons resolves itself, therefore, into this, "whether Mr. Bentley should be left to obtain, if he can, his "remedy in separate proceedings, or whether he should now be "joined as a party to the present action in order that he may, "by counterclaim, seek therein to enforce his contract with the

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[45] [1945] 2 All E.R. 212, 213.

[46] [1892] 1 Ch. 487.

[47] [1945] 2 All E.R. 211.

[48] Ibid. 212, 213.

"plaintiffs. . . . In my judgment one of the main objects of the "rule is to render unnecessary such multiplicity of proceedings. "Nor, in my opinion, is it material, if the circumstances in other "respects justify the joinder, that the plaintiff in the action "should not prefer any claims against the party joined and that "the practical effect of the joinder is so that the party joined "may assert his case by way of counterclaim against the "plaintiff."

If the dicta of Lord Esher M.R. represented the law, Mr. Aldous is right in his submission at least to the extent that this summons cannot be dismissed for want of jurisdiction. But in my judgment they cannot be reconciled with the other line of authorities interpreting the rule. If the test of the matter is that which Lord Esher M.R. propounds, then in at least three other cases the court was embarking upon an irrelevant inquiry. In the first of Lord Esher's cases the subject-matter of the action was a lease and a claim for dilapidations, and in the second a contract of affreightment. By the same test in *McCheane* v. *Gyles* (*No.* 2)[49] the subject-matter of the action was a trust or a claim for breach of trust, and it seems to me to be impossible to say that another trustee was not involved in that. In *Hood Barrs* v. *Frampton, Knight & Clayton*[50] the subject-matter was the title to the rents of a flat and the intervener was certainly involved in a dispute about that. In both these cases the essence of the decision was, I think, that the presence of the additional party was not necessary for the proper determination of the issue on the record. In *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*[51] the subject-matter was the right to possession of gold bars, and that right was claimed by the intervener; that simple answer, if sufficient, makes unnecessary the whole of the judgment of Wynn-Parry J. based on the note in the White Book. It means, too, as I have already suggested, that there is virtually no limit to the jurisdiction, so that any discussion about jurisdiction is almost otiose. Then there is the decision of the Court of Appeal in *Moser* v. *Marsden*,[52] which appears to me, as I have said, to lay down very clearly the limits to the jurisdiction. This case was cited to the court in *Montgomery* v. *Foy, Morgan & Co.*[53] and I find it impossible to believe that if the later court had intended to lay down a principle of construction that differed so widely from that adopted by the

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[49] [1902] 1 Ch. 911.

[50] [1924] W.N. 287.

[51] [1951] Ch. 33.

[52] [1892] 1 Ch. 487.

[53] [1895] 2 Q.B. 321.

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earlier court and, indeed, showed their decision to be wrong, the earlier case would have been read without comment. I think that Lord Esher's wide words [54] should be treated as authoritative only in so far as they govern the facts of the case, and that the interpretation of the effect of the case given by Buckley J. in *McCheane* v. *Gyles* (*No.* 2) [55] is the correct one. Similarly, I think that the observations of Lord Esher M.R. in *Byrne* v. *Brown* [56] on the Judicature Acts are intended to be general in character and to point out the unreasonableness of the third party's objection and how undesirable it would be if it had to be acceded to; but that the ratio decidendi of that case is that the third party had no right to object. If there is any conflict between these cases and *Moser* v. *Marsden*,[57] I think that I am entitled, and indeed bound, to follow the decision and reasoning in *Moser* v. *Marsden*.[57]

If I may express with diffidence my own view of the rule, apart from the authorities, I would support the narrower construction. I do not, with deference to those who have thought otherwise, agree that the main object of the rule is to prevent multiplicity of actions, though it may incidentally have that effect. The court has other ways of doing that which are amply sufficient for the purpose—by ordering consolidation or the bringing of actions on together or third party proceedings and so on. The primary object of the rule I believe to be to replace the plea in abatement. The object of that plea was to " abate " an action in which all the proper parties were not before the court. The rule is more flexible than the plea, but its object is fundamentally the same. It is not to marry a future action to an existing one, but to ensure that all the necessary parties to the existing one (using " necessary " in the broad sense of being necessary to effectual and complete adjudication in the existing action) are before the court. It does, of course, incidentally keep down multiplicity of actions, because if the necessary parties cannot get before the court in an existing action, they will naturally try to do so in another action, but that appears to me to be a desirable consequence of the rule rather than its main objective. In *Moser* v. *Marsden* Lindley L.J. said [58]: " In order " to properly understand the rule we must look at the whole of it. " It begins by saying, ' No cause or matter shall be defeated by " ' reason of the misjoinder or nonjoinder of parties '—that is the

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[54] [1895] 2 Q.B. 321, 324.

[55] [1902] 1 Ch. 911, 917.

[56] 22 Q.B.D. 657, 666.

[57] [1892] 1 Ch. 487.

[58] Ibid. 490.

"key to the whole section: if the court cannot decide the "question without the presence of other parties, the cause is not "to be defeated, but the parties are to be added so as to put "the proper parties before the court."

I do not think that the words which I have to construe represent any addition to the powers of the court initiated by the Judicature Acts. I do not think that the necessary parties contemplated by it are other than those who would have been considered by a Court of Equity to be necessary before the passing of the Judicature Acts. It had always been the practice in equity to join as parties not merely those who in strictness "ought to have been joined" but also those whose presence was necessary to complete and effectual justice. The practice is stated in Mitford, Pleadings in Suits in the Court of Chancery, 5th ed. (1847), p. 190, as follows: "It is the constant aim of a "court of equity to do complete justice by deciding upon and "settling the rights of all persons interested in the subject of the "suit, to make the performance of the order of the court perfectly "safe to those who are compelled to obey it, and to prevent "future litigation. For this purpose all persons materially "interested in the subject ought generally to be parties to the "suit, plaintiffs or defendants, however numerous they may be, "so that the court may be enabled to do complete justice by "deciding upon and settling the rights of all persons interested, "and that the orders of the court may be safely executed by "those who are compelled to obey them, and future litigations "may be prevented." The words in the rule which I have to construe are really no more than a condensation of this statement.

*Townend* v. *Toker* [59] shows the type of case in which the old practice was applied in just the same way as the rule should be applied today. In this case the defendant made a settlement of her estate on her nephew. She then repented of it and agreed to sell the estate to the plaintiff. The plaintiff sued the defendant for specific performance of the contract of sale. If the settlement on the nephew was voluntary it would have been void against the plaintiff; if, on the other hand, it was made for value it would not. Turner L.J. considered that the nephew was properly joined as a party. He said [60]: "It is, no doubt, true "that in ordinary cases of suits for specific performance, the "vendor and purchaser are the only proper and necessary parties "to the suit. . . . but at all events it appears to have been "the constant practice of the court to make persons interested

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[59] (1866) L.R. 1 Ch. 446.

[60] Ibid. 457, 458.

"under settlements alleged to be voluntary, parties to suits of "this description, and I am not disposed to alter that practice." At common law, I think, the old practice was only to join parties "who ought to have been joined" in the strict sense, such as joint contractors; I dare say that was because the order of a common law court rarely, if ever, affected the legal interests of any third party. The provision in the rule relating to necessary parties is therefore primarily designed, I think, to give effect to the old practice in equity, though, of course, it is now available in any kind of suit. It is interesting to note that the common law had meanwhile been handling in its own way the problem of a multiplicity of actions. Consolidation is a common law device, as is shown by the terms of Ord. 49, r. 8. The practice before the Judicature Acts is set out in Tidd's Practice, 9th ed. (1828), Vol. 1, p. 614.

Of course, whatever the object, it is the words of the rule that now govern the matter, and it is true that the words "all "the questions involved in the cause or matter" are very wide. They are so wide that no one suggests that they can be read without some limitation. The limitation is not something that is left to be settled by the court in its discretion. It is there in the earlier words of the rule. The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it is *necessary* to hear them for that purpose. The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party.

On the wider construction of the rule, I do not understand where the line is to be drawn—it is conceded that it must be drawn somewhere—between a commercial interest in the question involved in the case and a legal one. It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally—that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested. It is not enough for him to say in effect: "Here are A and B fighting "about an invention. I have got a complaint against A which "has to do with the same invention. I could issue a writ against "him but I prefer to intervene." Of course, it is desirable, if it can be managed, that actions about the same invention should be tried together. If Ord. 16, r. 11, were the only way in which that could be done, one might be tempted to enlarge its application. But that can be achieved just as well in a proper case by an order to consolidate. There can be very little difference in expense. Joinder will save the cost of a writ, but there will be the cost of an affidavit to support the summons, and the existing writ will have to be amended and served; the counterclaim delivered by the intervener and the defence to counterclaim will be just as elaborate as the pleadings in a new action. But I do not think that Ord. 16, r. 11, is designed to offer a slightly cheaper alternative to consolidation. There are three reasons for this opinion in addition to those I have given. The first is that the intervener with a cause of action bears the character of a plaintiff. The last sentence of the rule shows that a person joined as a defendant is intended to have the character of an ordinary defendant. It can be said that that is not prerequisite to the application of the rule, but it is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. The second reason is that, if designed as an alternative to consolidation, the rule works arbitrarily. If the intervener has a cause of action against the plaintiff, he can use the rule; but if he has a similar cause of action against the defendant he must sue independently. That would be quite illogical if the chief object of the rule was to avoid multiplicity. The third reason is that the rule does not make provision for any formal statement of the intervener's case before the joinder is ordered. On the narrower construction of the rule a statement of the intervener's interest in the suit is enough to show whether he should be joined or not. But where a new cause of action is to be introduced, it is essential to see how it fits in with the existing cause of action. An affidavit is not enough, for it is not a document that formulates issues. It would generally be necessary to see the counterclaim and the defence to it before deciding whether the two matters ought to be litigated as one. The procedure for consolidation allows that to be done and, indeed, normally requires it.

I may now turn back to the two dicta of Wynn-Parry J. in *Atid Navigation Co. Ltd.* v. *Fairplay Towage and Shipping Co. Ltd.*[61] on which Mr. Falk relied, the first being that[62] "the basis "of the whole jurisdiction to add defendants is that there is a "cause of action by the plaintiff against not only the existing "defendant but the person who would be joined if the application "were successful," and the second being that the court would not make an order[63] merely to enable the proposed interveners "to join with the existing defendants in prosecuting a counter-"claim."

The conclusion which I have reached on the meaning of the rule brings me into substantial agreement with both these dicta. I have approached the question of jurisdiction by a different route, but it is unlikely that a person will be a necessary party, within the meaning I have given to the phrase, to an action by a plaintiff unless that plaintiff has a cause of action against him; if there is no cause of action, the relief sought by the plaintiff is unlikely directly to affect the intervener. It will be observed that Wynn-Parry J. did not say that the plaintiff must be made to plead a cause of action against the intervener. Nor did he mean, I think, that the court must be satisfied of facts showing a cause of action before it orders the joinder; it is sufficient that a prima facie cause of action should be shown; the dictum of Wynn-Parry J.[63] must be read in the light of his earlier reference to *Norbury Natzio & Co. Ltd.* v. *Griffiths*[64] where that was decided. If it were otherwise, the operation of the rule could easily be defeated. For example, a plaintiff seeking an order against an agent or warehouseman who has the custody of goods could defeat an intervention by the owner simply by saying that he did not believe him to be the owner. Notwithstanding the difficulties on the wording of the rule felt by Lord

[61] [1955] 1 W.L.R. 336.

[62] Ibid. 338.

[63] Ibid.

[64] [1918] 2 K.B. 369.

Coleridge C.J.,[65] the point must now be taken to be settled by *Norbury Natzio & Co. Ltd.* v. *Griffiths.*[66]

I am also substantially in agreement with the dictum (even if, as perhaps may be the case, it compels me not to follow the decision of Evershed J. in *Bentley Motors* (1931) *Ltd.* v. *Lagonda Ltd.*[67]) that the court should not allow an intervention which is made for the mere purpose of prosecuting a counterclaim. I do not myself—neither, I think, did Wynn-Parry J.[68]—determine the test of jurisdiction by reference to the nature of the counterclaim. But if an intervener has to be a person legally affected by the order which the plaintiff seeks, it must follow that his purpose in seeking to be joined is to resist the order or to be heard on its terms or to have modified in some way the judgment which the plaintiff seeks to obtain, and accordingly that his purpose in coming in is not merely to counterclaim. To say, therefore, that he may not be joined merely to counterclaim is, I think, only another way of saying that he is not to be joined unless he is legally affected.

Accordingly, I hold that the master was, on the submissions made before him, right in his conclusion that he had no jurisdiction to make the order asked for: and I must now consider Mr. Aldous's alternative submission that the orders for which the plaintiff is asking in his action may directly affect the legal interests of the intervener. The plaintiff's claim, as Mr. Falk rightly insists, is not based on a claim to property (except in the sense that rights under a contract are property) but on breach of contract. The breach alleged in paragraph 10 of the statement of claim is that the defendants disclosed or made use of confidential information; and the particulars alleged boil down to the fact that the defendants are manufacturing the "Stixit" pen. Accordingly, the injunction asked for in paragraph 3 of the prayer, while in words it seeks to restrain the defendants from making further use of the confidential information, in effect seeks to restrain the further manufacture of the "Stixit" pen. The intervener's first affidavit shows that he claims to be the inventor of the "Stixit" pen and that he entered the defendants' employment for the purpose of assisting them to market it. If the evidence stopped there I think that I should be bound, on the reasoning in *Moser* v. *Marsden,*[69] to hold that the intervener had shown no more than a commercial interest in the result of the action.

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[65] 2 C.P.D. 80, 83.
[66] [1918] 2 K.B. 369.
[67] [1945] 2 All E.R. 211.
[68] [1955] 1 W.L.R. 336.
[69] [1892] 1 Ch. 487.

If it was successful, the defendants could no longer exploit his invention, he might find it difficult or impossible to get other manufacturers to do so, and the defendants might (if the contract of employment permitted it) dispense with his services. All this would be commercially damaging to him: but the evidence (which described only in the most general terms the arrangements between the intervener and the defendants) did not then disclose any legal interest that would be affected. In his second affidavit the intervener exhibits two letters written in February and March, 1955, which he says constitute an agreement to pay him a royalty or commission (both words are used) on sales of the "Stixit" pen of five per cent. in the United Kingdom and Commonwealth, subject to a minimum of £1,000 a year, and 10 per cent. in Europe. The agreement contains, the intervener submits, an express clause requiring the defendants to undertake the manufacture and distribution of the "Stixit" pen in the United Kingdom and Commonwealth (except Canada).

Now the mere fact that a man is entitled to a royalty or commission on the sale of an article is not enough to enable him to say that he is legally affected by an order forbidding its manufacture. He has in such circumstances a commercial interest only in the continued manufacture of the article. But Mr. Aldous relies on two additional factors. The first is that the intervener is promised a minimum royalty. If the prohibition on manufacture entitled the defendants to cease paying the minimum royalty, the intervener's legal rights would be affected. That depends on whether the defendants would be entitled to rescind the contract on the footing, for example, that the intervener had expressly or impliedly guaranteed that he could grant the right to manufacture. What the position is about that I do not know; it is possible that the defendants took the risk. All that is said in the intervener's affidavit is that it is "possible" that the minimum royalty would cease; that is not enough.

The second fact relied on by the intervener is that there is an express obligation to manufacture in certain territories. Mr. Falk disputes that that is the right construction of the contract and that the obligation, if it exists, amounts to anything that is of any value in law. I do not decide either of these points. It is, as I have already shown, sufficient in this type of case that the intervener should have reasonable grounds for his contention, and I think that he has. If he can show that the defendants are obliged to manufacture a reasonable quantity of Stixit pens, he has a right of action against them if they do not do so. He is not then in the position of a person who draws a commission based on the quantity of articles which a manufacturer chooses to make. Mr. Dachinger could therefore ask, in a subsequent action, for specific performance of an agreement which the court had in the existing action in effect ordered not to be performed. Mr. Falk points out that the court is very unlikely to decree specific performance; it would give Mr. Dachinger his remedy in damages. But questions of jurisdiction under Ord. 16, r. 11, cannot depend on how the court may decide to exercise its powers. In any event the principle is just the same. The court should not be put in the position where it may have to order a person to pay damages for having carried out its own injunctions.

Mr. Falk next submits that the intervener's interests cannot be affected anyway, because, if the plaintiff is wrong, there will be no injunction: and if he is right, the injunction can be granted only on the basis that the duty of confidence was owed to the plaintiff and not to the intervener. This argument, in my opinion, misconceives the point. Whenever a plaintiff seeks to restrain a defendant from dealing with his property and an intervener claims that the property is his, the plaintiff can say: "If "I am wrong I shall not get an injunction and the intervener's "rights will not be affected; if I am right the intervener has no "rights to be affected anyway." The point is that the intervener is entitled to be heard on the issue whether the plaintiff is right or wrong so that he may be bound by the order made.

Mr. Falk's final submission is more far reaching than the others. He submits that the action and the intervener's claim are concerned with rights in contract and not rights of property, and, therefore, the case does not come within the term "pro-"prietary rights" as set out in the note in the White Book. I am not, of course, required to construe that phrase as if it were contained in a statute. If I was I should see no reason why rights under a contract should not be called proprietary rights just as much as rights to physical property. But the phrase is not used definitively. The three categories formulated in the note are not exhaustive. Indeed, I do not think they should be treated as having been formulated independently. There is one common principle running through them all, and for my part I should prefer to apply a test based on that principle rather than to inquire whether the case to be determined falls into one or other of the three classes. There is not, for example, any real distinction between the cases which related to specific performance and those which related to proprietary rights. As Wynn-Parry J. said in *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*[70]: "It seems to me that the true test lies not so much "in an analysis of what are the constituents of the applicants' "rights, but rather in what would be the result on the subject-"matter of the action if that right could be established." I respectfully agree with that. As I have said, I think the test is: "May the order for which the plaintiff is asking directly "affect the intervener in the enjoyment of his legal rights?"

It may be true, as Mr. Falk submits, that the authorities so far have been dealing with rights to physical property, but in my judgment the principle applies equally to contractual rights. I think that in this case the test is satisfied, that I have jurisdiction to make the order and that it is one which, having regard to the questions involved in the action, it is proper that in the exercise of my discretion I should make.

It must not be supposed that the test I have employed can be applied to every sort of application under the rule, and I am not attempting to lay down, or holding that the authorities lay down, a test of universal efficacy. A plaintiff may, in the first instance, join as a defendant any person "against whom the "right to any relief is alleged to exist" (Ord. 16, r. 4). If, after he has issued his writ, he wants to join another defendant, no doubt he will have to proceed under rule 11, but he will not have to show that the new defendant will be directly affected by an order in the action as it is then constituted: what he generally shows is that he cannot get effectually and completely the relief he asks for unless the new defendant is joined, and that, in that sense, the new defendant is a necessary party to the action. Likewise, a defendant who seeks to join another defendant does not inevitably have to show that the new defendant will be directly affected by an order in the action as it is constituted. He may succeed if he can show that he cannot effectually set up a defence which he desires to set up unless the new defendant is joined with it, or unless the order made binds the new defendant. It is not that the construction of the rule differs according to circumstances. The construction of the rule is, and must be, the same in all circumstances; but the test that is appropriate to determine whether a party is necessary or not may vary according to the circumstances. The set of rules assembled in the White Book and collected in the authorities which I have sought to follow are those which are applicable in the case of interveners whom it is sought to join against the will of the plaintiff.

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[70] [1951] Ch. 33, 42.

*Appeal allowed.*

Solicitors: *Godden, Holme & Co.; J. M. Menassé & Co.*

J. F. L.

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## GILMOUR CATERERS LTD. *v.* ST. BARTHOLOMEW'S HOSPITAL GOVERNORS.

[Plaint No. L. 936.]

C. A.
1956
*Jan.* 16.
Denning, Morris and Parker L.JJ.

*Landlord and Tenant—Act of* 1954*—Business premises—Application for new tenancy—Premises partially reconstructed after bomb damage—Landlords requiring possession for reconstruction—Agreement by landlords to grant building lease to third party—Building lessee to demolish and wholly reconstruct premises in accordance with landlords' requirements—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

The landlords were the owners in fee simple of two adjoining premises in Holborn, which had suffered bomb damage, one of which remained derelict while the other, after a partial reconstruction, was occupied under a sublease by the tenants, who carried on a restaurant business.

The tenants, whose sublease was due to expire in 1955, applied to the landlords for a new lease, and on their refusal made application to the county court for the grant of a new lease under the provisions of the Landlord and Tenant Act, 1954. The landlords opposed the application on the ground that they required possession, in order to demolish and reconstruct the premises, under the provisions of section 30 (1) (*f*) of the Act.[1]

The landlords had made an agreement with a third party to grant him a building lease of the two premises for a term of 48 years, upon condition that he cleared the site and erected a new building "in conformity in every respect with the plane elevations "and sections and specifications already approved of and signed by "the surveyor for the time being of the lessors and under the "inspection and to the satisfaction of such surveyor."

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[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy under the Act] ". . . are such of the following "grounds as may be stated in the "landlord's notice . . . that is to "say:—. . . (*f*) that on the termination of the current tenancy the "landlord intends to demolish or "reconstruct the premises comprised "in the holding . . . or to carry out "substantial work of construction "on the holding . . . and that he "could not reasonably do so without "obtaining possession of the holding."

The county court judge refused the tenants' application. On appeal by the tenants:—

*Held*, that the terms of section 30 (1) (*f*) were satisfied by the proposed demolition and reconstruction of the premises under the terms of the agreement, and the appeal failed.

APPEAL from Judge Dale, sitting at Westminster County Court.

The defendants were the owners in fee simple of Nos. 307 and 308, High Holborn; before 1940 these were substantial buildings containing six stories, including basements, but they received war damage as a result of which No. 308 remained derelict, while No. 307 received sufficient repairs to enable the basement and two stories to be occupied.

In 1950 the plaintiffs became assignees of a sublease expiring on September 28, 1955, of the remnant of No. 307 and carried on a restaurant business on the premises. They applied to the landlords under the provisions of the Landlord and Tenant Act, 1954, for the grant of a new lease, which was refused; they then applied to the county court under section 24 of the Act.

On June 16, 1955, the landlords by a resolution accepted the offer of one Kelson to take a building lease of Nos. 307 and 308 for a term of 48 years from September 29, 1955, at a rent of one peppercorn for the first year and of £1,700 thereafter. The agreement provided by clause 2 (a): "The lessee will at his "own expense and with all reasonable speed demolish and clear "away as necessary the war damaged buildings now standing "or existing or being on or under the land coloured pink and "red on the said plan and erect in a substantial and workman- "like manner and as one hereditament in conformity in every "respect with the plans elevations and sections and specifica- "tions already approved of and signed by the surveyor for the "time being of the lessors and under the inspection and to the "satisfaction of such surveyor a new building on the said land "such new building to be completely finished on or before the "25th day of December, 1956, or within such extended period "as the lessors may hereafter in writing agree." By clause 12: "The said lease shall be granted and the lessee shall accept the "same and execute a counterpart thereof when and so soon as "the said new buildings shall have been completely finished "and the said new buildings made fit for occupation in accord-"ance with the stipulations hereinbefore contained and a "certificate to that effect signed by the said surveyor shall have "been produced to the lessors such lease and counterpart to be "prepared by the solicitors of the lessors and the lessee shall "not require any abstract or evidence of the title of the lessors."

The landlords opposed the application on the ground that they required possession in order to demolish or reconstruct the premises, relying on section 30 (1) (*f*) of the Act. The county court judge held that the landlords, by virtue of their agreement to grant a building lease in the terms stated, had satisfied the requirements of the subsection, and dismissed the tenants' application. The tenants appealed.

*Harold Heathcote-Williams Q.C.* and *L. I. Stranger-Jones* for the tenants. The conclusions of the judge below were wrong, in that to satisfy the subsection the intention to occupy and reconstruct must be the landlord's, whereas in fact they were those of the tenant under the building lease. In order to obtain possession the landlord must satisfy the court that he intends to reconstruct and that he requires possession for that purpose. Under the Act of 1954 the onus is on the landlord, and the language is much more stringent than that of the corresponding sections in former Acts, such as section 5 of the Landlord and Tenant Act, 1927, and section 12 of the Leasehold Property (Temporary Provisions) Act, 1951.

Here there is the intention to grant a separate estate in the land, and to have the work carried out by one who is in no way the agent of the landlords for whom they are responsible; if the tenant in rebuilding infringed the building by-laws or town-planning requirements, the landlords would not accept responsibility. Moreover, at the time when the tenants' application was made the governors were merely contemplating the grant of a building lease, and mere contemplation does not amount to an intention: *Cunliffe* v. *Goodman* [2]; it was not until later, on June 16, 1955, that they came to any resolution on the matter, whether to reconstruct themselves or to grant a building lease.

[Morris L.J. Suppose that the landlords had employed contractors to do the work, on condition that they would grant a lease to the contractors when the work was complete?]

That would be within the section; the contractors would be doing the work as the landlords' agents, and would be mere licensees on the site, of which the landlords would at all times be entitled to possession. If the landlords hand over possession of the site to a third party, such as a prospective tenant, the terms of the section are not satisfied; a tenant is not the alter ego of a landlord: *Pegler* v. *Craven.*[3] [*Jones* v. *Gates*[4] was also referred to.]

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[2] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

*H. J. Phillimore Q.C.* and *R. H. W. Dunn* for the landlords. Under the terms of the contract the landlords have complete control over the actions of the building lessee; the building to be erected will be strictly in accordance with plans previously agreed by them. Further, it is not until the building is complete that the lease is to be granted; until then, the building lessee is a tenant at will with possession. The present agreement gives the landlords even more control over the demolition and reconstruction than they would have under the ordinary form of building contract.

The only real distinction between an ordinary building contract and the present agreement is that a building contractor is remunerated by money, while the building lessee is remunerated by a lease, and it is conceded that a building contract in the ordinary form would satisfy the section. A contractor is not the servant or agent of the owner; he is an independent contractor. A building lessee is similarly independent, only he is paid in a different way. That is not the kind of distinction which the section contemplates.

In construing the section it should be remembered that it is interfering with the rights of landlords, and it should not be construed too strictly; it cannot require that a landlord should demolish and reconstruct with his own hands. On its true construction the section is satisfied if it is established that the landlord "intends to have the premises demolished or reconstructed."

*Heathcote-Williams Q.C.* replied.

DENNING L.J. Gilmour Caterers Ltd. were tenants of No. 307, High Holborn, which is just off the top of Chancery Lane. They took an assignment of those premises in 1950. The lease was due to expire on September 28, 1955. The landlords are St. Bartholomew's Hospital. Gilmour Caterers Ltd. claim that they should have a new lease under the new Landlord and Tenant Act, 1954. St. Bartholomew's Hospital oppose that on the ground that they intend to demolish or reconstruct the premises. That is a ground of opposition given by section 30 (1) (*f*) of the Act.

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[3] [1952] 2 Q.B. 69; [1952] 1 T.L.R. 618; [1952] 1 All E.R. 685.

[4] [1954] 1 W.L.R. 222; [1954] 1 All E.R. 158.

The condition of the premises is so bad that they ought obviously to be demolished and reconstructed in the very near future. They suffered severe war damage, and have not been fully rebuilt since that damage. The next door building is a shell. The whole place calls aloud for immediate demolition and reconstruction. And that is what the Governors of St. Bartholomew's Hospital intend to do. They have considered the various ways of doing it, and they have decided not to employ building contractors to do the work for them but to agree to grant a building lease for 48 years. This agreement for a building to lease is in the usual terms. The lessee is to hold as a tenant at will until the new building is completed, and, when he has completed the new building, he is to be granted a lease for 48 years as from the beginning. The landlords, St. Bartholomew's Hospital, under the terms of the agreement have full control over that work that has to be done. Everything has to be done to their approval and is under their inspection, and if anything untoward happens they can immediately re-enter.

The argument before us is that the hospital have not made good their ground of opposition. It is said that in section 30 (1) (*f*) the words "the landlord intends to demolish or reconstruct the "premises" mean that the landlord must intend to do it himself or by his immediate servants and agents, and that that excludes a case of this kind where the landlord intends to get it done under the terms of a building lease.

In my judgment that is much too narrow an interpretation of section 30 (1) (*f*). The landlord intends to demolish or reconstruct the premises even though he does it through the hands of a building lessee. In a way, the grant of a building lease is a means of paying for the work. Just as when you employ a building contractor you pay him in money, so you pay the building lessee by granting him a period of years of occupation. It seems to me that, whether the work is done directly by a building contractor or less directly through a building lessee, the landlord intends to demolish or reconstruct the premises. He intends to have it demolished and reconstructed, and that is sufficient. The judge so held, and I see no reason to interfere with his decision.

Mr. Heathcote-Williams did mention that the earlier Acts of 1927 and 1951 made the position much clearer in favour of the landlord in such circumstances as these. Although the language in this Act is not so explicit as in those, I think that it is sufficient to cover the landlords in this case; and I would dismiss the appeal.

Morris L.J. I entirely agree with the judgment which my Lord has just delivered and with the judgment of the county court judge. The case involves construing the wording of section 30 (1) (*f*) of the Act. Mr. Heathcote-Williams referred us to the provisions in the Landlord and Tenant Act, 1927, contained in section 5 (3) and (4), and he further referred us to the Leasehold Property (Temporary Provisions) Act, 1951, section 12 (3) (*c*). He invited us to say that there is significance in the change of language: that the earlier provisions were impersonal in their expression and that the present language is different. Although it has been helpful to be referred to those sections, nevertheless it is to the language of the present section that we must devote our attention.

It is, I think, abundantly clear that what the landlords wanted, to use a neutral expression, was to get possession of the premises now used by Gilmour Caterers, which form the mere shell of a former building. They wanted to have new premises erected on the site. The question is whether they intend to demolish or reconstruct the premises. If they do, it is necessary that they should have possession of the premises because they could not reasonably do the demolition and reconstruction without having possession. On the latter point there is no dispute. The landlords could not demolish and reconstruct without having possession.

But Mr. Heathcote-Williams says: Granting that, in this case the landlords have not shown that they intend to demolish or reconstruct. Clearly that was their wish; but Mr. Heathcote-Williams says that they have not shown that they, the landlords, intend to demolish or reconstruct. The words of section 30 (1) (*f*) cannot, in my judgment, mean that the landlords must themselves personally demolish or reconstruct. Landlords might be a limited company, who could only act through agents or servants. The same really applies to nearly every other landlord. In reality a landlord must employ people if he wishes to demolish and reconstruct.

Mr. Heathcote-Williams concedes that, if the landlords in the present case had employed building contractors to demolish and reconstruct and had then granted a lease, the provisions of the Act would have been satisfied.

In my judgment the effect and result is exactly the same under the arrangement which the landlords have in fact made. [His Lordship read the clauses in the agreement set out above and continued: ] The scheme, therefore, is that, when the building is completed, there will be a lease, though that lease is to be dated from September 29, 1955, and there is a provision for a rent in money to take the place of a peppercorn rent, which is to apply for the earlier period.

It seems to me that on the facts here the landlords are intending to demolish and reconstruct the premises. They need possession in order to do so. Their intention will be carried out just as effectively by this agreement as it would be by an agreement in some other form, such as, for example, one made with building contractors. The landlords achieve exactly the same result by this arrangement. It is really a mere matter of machinery, and, in my judgment, in every reasonable sense it is proper to say that the landlords are shown to intend to demolish and reconstruct the premises comprised in the holding.

I agree that the appeal fails.

Parker L.J. I agree, and would add only this. Mr. Heathcote-Williams concedes that the expression in sub-paragraph (*f*) "the landlord intends to demolish or reconstruct the "premises" does not and cannot mean that the landlord must do it with his own hands. He says, however, that it must be done either by the landlord himself, or his servants or agents. Taking that strictly, it would exclude the very ordinary and common case of a landlord employing building contractors to do the work. It seems to me that the true construction of sub-paragraph (*f*) is that the landlord must show that he intends to cause the demolition or reconstruction of the premises, whether by a building contractor or in some other way. Viewed in that light, I cannot see that the arrangement made in this case, under which the landlords had complete control of the nature and design of the reconstruction and the way in which it was carried out, does not equally bring them within the words as if they had employed a building contractor.

I would dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Henry S. L. Polak & Co.; Wilde, Sapte & Co.*

F. R. D.

C. A.

1955
Dec. 9,
12, 16.

Evershed M.R.,
Birkett and
Romer L.JJ.

## JACKSON AND ANOTHER *v.* CROUCHER.

*Landlord and Tenant — Rent restriction — Repairs and rent—Repairs increase—Validity of notice of increase of rent—Prescribed form—Omission of part of calculation—Jurisdiction of court to permit amendment—Liability to do repairs—Tenant not liable—Notice of election by landlord—Effect on permitted repairs increase under Act of* 1920*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*d*)*—Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 23, 25 (3), (4), 30*—Housing Repairs (Increase of Rent) Regulations,* 1954 (*S.I.* 1954, *No.* 1036), *Schs.* 1, 4, 8.

A statutory tenant refused to comply with a notice of an increase of rent to be made under the provisions of the Housing Repairs and Rents Act, 1954. The first ground of objection was that the notice, though made on the proper form, was invalid because the form had not been fully completed, the landlords having omitted to state the deduction, if any, from the maximum increase which would be required to ensure that the recoverable rent (less the amount of the rates payable by the landlords) did not exceed twice the gross value of the premises. It was not disputed that no deduction was required.

Secondly, the tenant contended that service of a notice of election under section 30 (3) of the Act of 1954 had the effect of reducing not only the maximum amount of the repairs increase which was permitted by section 23 of that Act, but also the amount of the repairs increase permitted under section 2 (1) (*d*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, having regard to a statement made on the prescribed form of notice that the effect of the election would be that the landlords would be entitled to a smaller repairs increase, but would not be responsible for keeping the interior of the premises in good decorative repair:—

*Held*, (1) that although section 25 (3) of the Act of 1954 emphasized that full information should be given to the tenant of the way in which a repairs increase had been calculated, the omission of part of the calculation in the present case was innocuous. In exercise of the discretionary powers conferred on the court by section 25 (4) of the Act of 1954 the landlords should be permitted to amend the notice, which should then take effect as from the date on which it was originally served.

(2) That the effect of election under section 30 (3) of the Act of 1954 was to limit the repairs increase permitted under that Act. For that purpose it had to be made plain on the form of notice that the landlords repudiated responsibility for internal decoration as a matter of obligation, but as the tenant was not under any express liability to do repair, by the terms of section 30 (1) the landlords were, for the purposes of section 2 (1) (*d*) of the Act of 1920, still to be deemed as between themselves and the tenant wholly responsible.

Therefore, the increase of rent permitted under that provision was unaffected by the election.

APPEAL from Judge Hodgson sitting at Wandsworth County Court.

Arthur Richard Jackson and Peter Ralph Taylor Nightingale were the freeholders of a dwelling-house known as No. 22, Ingrave Street, Battersea, London, S.W.11. The dwelling-house was subject to the control imposed by the Rent and Mortgage Interest Restrictions Acts, 1920–1938 (that is "old control") and was occupied by Charles Croucher as a statutory tenant. He was not liable for repairs of the dwelling-house. At some date prior to December 30, 1954, the landlords had made the maximum increase permitted to them under those Acts of 40 per cent. of the net rent.[1] On December 30, 1954, the landlords served on the tenant a notice [2] stating that it was proposed to increase the existing recoverable rent of £1 3s. 7d. per week by 5s. 2d. The notice was supported by a declaration [3] that the conditions justifying a repairs increase had been fulfilled and that work of repair to the required value had been carried out. A notice of election [4] by the landlords under section 30 (3) of the Housing Repairs and Rents Act, 1954,[5] was also included. The increase was stated to operate from February 14, 1955, but the tenant refused to pay. In proceedings in the county court brought by the landlords the tenant challenged the validity of the notice of increase on the ground that a relevant part had not been filled up and duly completed, because the landlords had not stated the amount of the deduction, if any, which would be required to ensure that the recoverable rent including the proposed repairs increase, but excluding any sum paid by the landlords for rates, did not exceed twice the gross value of the dwelling-house. The tenant conceded that no deduction was required. He challenged the supporting declaration on the ground that certain items which he alleged were not the work of repair had been included in the work of repair alleged to have been carried out. He further contended that as the landlords had served a notice of election under section 30 (3) of the Act of 1954, they were no longer entitled to the maximum increase for repairs permitted under section 2 (1) (*d*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The county court judge gave judgment for the landlords and the tenant appealed.

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2: "(1) The amount by which the "increased rent of a dwelling-house "to which this Act applies may "exceed the standard rent shall . . . "be as follows, that is to say:— . . . "(c) In addition to any such amounts "as aforesaid, an amount not exceed-"ing 15 per cent. of the net rent . . . "(d) In further addition to any such "amounts as aforesaid—(i) where "the landlord is responsible for the "whole of the repairs, an amount not "exceeding 25 per cent. of the net "rent;"

[2] The prescribed form is as set out in Sch. 1 to the Housing Repairs (Increase of Rent) Regulations, 1954, together with the notes to be inserted set out in Sch. 8. [Form R.R.3.].

[3] Schs. 2 and 8 [Form 4a].

[4] Schs. 4 and 8 [Form R.R.6].

[5] Housing Repairs and Rents Act, 1954, s. 30: "(3) Where neither the "landlord nor the tenant is under "an express liability to carry out "internal decorative repairs, then if "not later than the service as respects "the dwelling-house of a notice of "increase under section 25 of this "Act the landlord serves on the "tenant a notice in the prescribed "form electing that this subsection "shall apply to the dwelling-house— "(a) the amount of any repairs "increase recoverable by the landlord "in respect of the dwelling-house "shall be reduced by one-third . . . "(c) in determining for the purposes "of this Part of this Act whether the "dwelling-house is or was at any "time in good repair, the state of "internal decorative repair of the "dwelling-house and any other "premises shall be disregarded unless "it is or was at the time in question "such as to make the dwelling-house "not reasonably suitable for occupa-"tion."

[The relevant details of the notice of increase of rent are set out in the judgment of Evershed M.R.]

*D. J. Turner-Samuels* for the tenant. The effect of serving a notice of election in the prescribed form (R.R.6) pursuant to section 30 (3) of the Act of 1954 is that the landlords cease to be wholly responsible for keeping the premises in repair and, therefore, they are no longer entitled to the maximum increase for repairs permitted under section 2 (1) (*d*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for they cannot under section 30 (1) of the Act of 1954 be " deemed " to be wholly responsible for repairs when on the notice served by them it is clearly stated in the footnote that they are not responsible for internal decoration. Section 30 (1) creates a statutory fiction where there is no express liability, but it can be displaced by service of a notice of election under subsection (3) both as regards the increase permitted by the Act of 1954 and by the Act of 1920.

In construing section 30 (1) of the Act of 1954 the footnote to the prescribed form of notice must be taken into consideration, for there is a presumption that the regulations and the forms made under them are valid and correctly set out the intention of Parliament. Unless it is shown that that is not so, the regulations and the forms are to be construed as one with the Act under which they are made: *Wicks* v. *Director of Public Prosecutions.*[6]

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[6] [1947] A.C. 362; 63 T.L.R. 6; [1947] 1 All E.R. 205.

The landlords are not entitled to the increase permitted under section 23 (1) of the Act of 1954 because the notice of increase served by them is incomplete and, therefore, not valid. They have not stated whether any deductions have to be made to ensure that the recoverable rent, subject to certain exclusions but including the proposed increase, does not exceed twice the gross value. They have not, therefore, given to the tenant full particulars of the way in which the amount of the increase in rent is calculated, as they are required to do by section 25 (3). It is conceded that in this case no further deduction is needed and that the right way to fill in this part of the form is to put "nil" against that heading; but it does not follow that the information does not have to be given by the landlords. The regulation requires them to give the tenant full details; they are not entitled to rely on information being already available to the tenant, nor can the tenant know whether it will make any difference to the amount which he is called on to pay until the calculation has been made. The tenant is entitled to be shown how the result is arrived at and no doubt in some cases the information afforded under this heading will be of the greatest interest to tenants.

*G. L. S. Dobry* for the landlords. In order to displace the presumption that the liability to repair for the purposes of section 2 (1) (*d*) of the Act of 1920 is on the landlord, section 30 (1) provides that the tenant must be expressly liable for repair. There is nothing in section 30 (3) or in the Housing Repairs (Increase of Rent) Regulations, 1954, or in the prescribed forms which imposes any liability on the tenant to do repairs. The mere repudiation of liability by a landlord does not have the effect of putting the tenant under any liability. It is not, of course, legitimate to have regard to what may happen in practice; if the landlord does not do internal decorations the tenant may be forced to do them; but, as with the transfer of burdens provisions in the Rent Acts, that is not a relevant consideration. The effect of the corresponding provision of the Act of 1920 was considered in *Morgan* v. *Liverpool Corporation*.[7] [He was stopped on this point.]

With regard to the second point, it is submitted that the form is valid as it stands. The county court judge, as he was entitled to do under section 25 (4), gave leave to amend the form, and the landlords will add the details required provided that the form is then validated as from the original date of service of the notice.

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[7] [1927] 2 K.B. 131; 43 T.L.R. 146.

*Turner-Samuels* in reply. The landlords should not have relief as from the time when the notice was originally served for they took no steps to have the matter put right until the hearing although the tenant had drawn their attention to the omission.

EVERSHED M.R. This appeal has raised two questions emerging from the impact of the Housing Repairs and Rents Act, 1954, upon the pre-existing rent restriction legislation. The Act of 1954 was designed, inter alia, to give to a landlord added rights of increasing the rent in cases in which repair obligations by him ought fairly to be covered. The provisions of the Act of 1954 are highly elaborate, and the elaboration is enhanced because, pursuant to the terms of the Act itself, regulations [1] were made under which various forms were prescribed, their purpose undoubtedly being to make as clear as could be to a tenant who received a notice of increase how the increase was justified arithmetically. The desirability of that course is, I think, made manifest by the fact that in many cases the calculations would be of a most complex character—at any rate, complex to anyone who was not particularly versed in arithmetical problems. As the judge dealt with what I will call the calculation point first in his judgment, and as I have just made a reference to the question of forms, I will follow him and deal first with that matter.

It arises particularly under the terms of section 25 of the Act of 1954: "(1) No sum shall be recoverable by way of repairs "increase . . ."—I should observe that the phrase "repairs "increase" is by section 23 (2) of that Act defined so as to mean an amount of any increase payable by virtue of section 23 (1)—"unless the landlord has served on the tenant or a former "tenant of the dwelling-house a notice in the prescribed form of "his intention to increase the rent (hereinafter referred to as a "'notice of increase'), accompanied by—(*a*) a declaration "in the prescribed form that at the date of service of the notice "the conditions justifying an increase of rent were fulfilled; . . . "and no such sum shall be recoverable before, or in respect of "any period before, such date as may be specified in the "notice . . . (3) The forms prescribed for the purposes of this "section shall be such as, taken together, to contain such "information as appears to the minister expedient for informing "the tenant of the effect of this Act and in particular of the "circumstances in which the repairs increase is recoverable from

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[1] S.I. 1954, No. 1036.

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" or may be withheld by the tenant, and of the way in which " the amount of the increase is calculated. (4) The county " court, if satisfied that any error or omission in a notice of " increase or a declaration accompanying such a notice is due " to a bona fide mistake on the part of the landlord, shall have " power to amend the notice or declaration by correcting any " errors or supplying any omissions therein . . ." The subsection goes on to provide that if there is such an amendment, the court may provide that the notice shall, notwithstanding, take effect as from its original date.

The form which was prescribed under the regulation, and which, therefore, I assume appeared to the Minister expedient for the somewhat ambitious purposes stated in subsection (3), is the form R.R.3, of which the landlords availed themselves in this case. On the face of it, the notice states: " Take notice " that the existing recoverable rent of the above-mentioned " premises inserted at (1) below will be increased as from " February 14, 1955, by the repairs increase permitted by the " above-mentioned Act, the amount of which is inserted at (2) " below." The (1) below is " Existing recoverable rent of the " premises £1 3s. 7d. per week "; and (2) below was " Repairs " increase as calculated overleaf 5s. 2d. Total Rent £1 8s. 9d." Overleaf is found: " Calculation of repairs increase." This is all part of the prescribed form. The first thing that is said is: " Maximum repairs increase of twice the statutory repairs deduction for the premises, the gross value of which is £32 per " annum, 7s. 8d. per week."

Since the landlords have availed themselves of a provision (to which I shall come presently) in regard to internal decorative repairs, there had to be a 33⅓ per cent. deduction from that figure, namely, 2s. 6d.; producing a repairs increase recoverable of 5s. 2d., which is to be seen on the front of the form. But in between those figures the form provides for further deductions that will or may have to be made. One is as follows: " Less (ii) A " further amount (if any) calculated in the manner set out below " to ensure that the recoverable rent, excluding the amounts " set out below but including the repairs increase, does not " exceed twice the gross value of the premises." In the circumstances, no further deduction had to be made, because it appears that when the rates for which the landlords are liable are deducted, the new increased rent remains appreciably below twice the gross value. So that the right thing to insert there is either the word " Nil " or " None "; or to leave it blank; and if that is so, the question then arises—and this has been the point—whether the landlords should fill in at all the second part of this reverse in the form which is headed in turn "Calculation referred "to in (ii) above."

The landlords say that if, as a matter of strict obligation, against the phrase "A further amount (if any) calculated in the "manner set out below . . ." the right thing to put is "Nil," that negatives the requirement that they should have to make any calculation; because the only calculation foretold is a calculation of a further amount; and, ex concessis, there is none.

Nevertheless it appears to me, I must say, that that strict view may well not give effect to the obvious intention of the Act that the tenant should be fully informed. I have read already section 25 (3), which emphasizes, among other things, the need to inform the tenant (at any rate, in the way the Minister thinks expedient) of the process by which the amount of increase is calculated. In this case, bearing in mind that the increased rent, if justified, is £1 8s. 9d., it follows, of course, to the merest tyro in arithmetic that unless something has been deducted, that is more than twice the gross value, which is £64 only per annum. It is quite plain here that the explanation of the apparent discrepancy lies in the fact that the rates are payable by the landlords and they amount to £25 5s. per annum. As I have said, although on a strict reading of the demands of this form the circumstances here may justify the view that the landlords did not have to fill in the back at all, nevertheless I should rather regret it if I had so to hold, because I think that a tenant, not in this case but in some cases, might thereby be deprived of the information which the form was intended to give. However, fortunately we are not bound to pursue that matter. The landlords made it quite plain to the judge that if their view was not strictly right, they were most willing to have the form amended; they asked to have it amended. And the judge was in turn quite satisfied that there was no real point here; the tenant was perfectly well aware, or should have been well aware, of what the figures were. There is no deprivation in his case of essential knowledge. The judge, therefore, said that, if it were necessary, he would have given, in pursuance of his discretionary powers under section 25 (4), leave to amend by filling in the figures which Mr. Dobry has explained to us. Mr. Dobry has said that he has always been willing to have that amendment made, and we have thought the best course would be to accept that suggestion which Mr. Dobry has been good enough to make, to adopt what the judge thought it would be right to do, and which it was only necessary to do, of course, on the footing that the argument if pursued on the landlords' part ought to be rejected; to insert this amendment, and, having done so, to do no more about this aspect of the matter. That, I think, is what we should now do—amend the notice as the county court judge said that he was prepared to do if necessary, and to say, in the exercise of the discretion, as the judge again was plainly prepared to say, that the notice should still take effect from the date which it originally stated.

There remains the second point, which is also a very short one, but which arises under section 30 of the Act of 1954 when taken with section 2 (1) (*d*) of the Act of 1920. By the Act of 1920 a limited power of increasing rents was conferred. [His Lordship read section 2 (1) (*d*) as set out above and continued:] Originally that Act contained in section 2 (5) a provision which included this:—" and the landlord shall be deemed to be " responsible for any repairs for which the tenant is under no " express liability." That provision was repealed by the Act of 1954, section 30 (1) of which provides as follows: " For the " purposes of this Part of this Act and the Second Schedule " thereto and of paragraph (*d*) of subsection (1) of section 2 of " the Act of 1920 the landlord shall be deemed, as between " himself and the tenant, to be wholly responsible "—the word " wholly " is now used—" for the repair of a dwelling-house in " any case where the tenant is under no express liability to carry " out any repairs." The words " in any case " are also new.

In this case there is no question that the tenant is not under any express liability to carry out repairs. If, therefore, the matter stood alone thus, it would follow that by section 2 (1) (*d*) of the Act of 1920 the landlords had the power to increase by the 25 per cent. therein mentioned; but subsection (3) of section 30 of the Act of 1954 must also be regarded, and I, of course, accept it that these two subsections must be read in conjunction: [His Lordship read the subsection as set out and continued:] I have said that the phrase " repairs increase " relates exclusively to the right to increase rent conferred by section 23 (1) of the Act of 1954. Therefore, paragraph (*a*) of section 30 (3) does not in terms have any effect upon or bear any relation to, the right to increase conferred by section 2 (1) (*d*) of the Act of 1920. But recourse must again be had to the statutory prescribed forms, and it is obligatory upon the landlord who exercises this option, as these landlords did, to fill in another form, R.R.6, which has a note at the bottom (and it must have such a note) and the last sentence in the note is: "The effect of an election is "therefore"—and that word "therefore" is because there has been a summary of the subsection above—"that the landlord "will be entitled to a smaller repairs increase, but he will not "be responsible for keeping the interior of the premises in good "decorative repair."

It is therefore said by the tenant that the effect of section 30 (3), when it is brought into operation, and of the prescribed machinery for doing so, is either to confer in some way upon the tenant a liability for repair, or, at least, to negative necessarily the proposition that the landlords are exclusively so responsible themselves, because it is said they cannot in one and the same breath, so to speak, say "We must be deemed to be solely "responsible for all repairs," and tell the tenant on the prescribed form that they are not responsible for internal decoration.

I agree with the judge that there is perhaps some inelegance in the wording. The wording, he said, might have been happier, and, indeed, there are perhaps few Acts of Parliament to which that observation might not at some time be applied. But, in my judgment, it is tolerably clear that though the effect is expressly to limit the landlords' right to recover the 1954 Act increase, and though for those purposes it is right to make plain that the landlords repudiate responsibility for internal decorative repairs as a matter of obligation, it still seems to me to remain inevitably true that by the express terms of section 30 (1), since the tenant is under no express liability, the landlords for the purposes of section 2 (1) (*d*) of the Act of 1920 remain as between themselves and the tenant wholly responsible.

Agreeing, therefore, as I do, with the judge upon that matter, on which really there is no more to be said, it seems to me that upon this part of the case the tenant fails. Upon the other part of the case, with which I have already dealt, I have forborne from expressing any concluded view on the strict effect of the form; and, since we adopt what the county court judge said he would if necessary do, it may be that we shall have to consider the right form of order to make.

BIRKETT L.J. I agree with the judgment of the Master of the Rolls and do not desire to add anything to it.

ROMER L.J. I also agree and have nothing to add.

[The notice R.R.3 having been amended accordingly and served, the court stated that the amended notice should take effect as from the original date.]

*Appeal dismissed.*

Solicitors: *Garber, Vowles & Co.; Frank Taylor, Nightingale & Baker.*

E. D.

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## SHERRIN *v.* BRAND.

[Plaint No. L. 3154.]

C. A.
1955
*Dec.* 6, 7, 8, 9, 12.

Evershed M.R., Birkett and Romer L.JJ.

*Landlord and Tenant — Rent restriction — Possession application — Conditional order for possession against statutory tenant—Conditions not complied with by tenant—Death of tenant—Devolution of statutory tenancy on member of tenant's family—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*g*), 15 (1)—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4 (2).

The statutory tenant of premises within the protection of the Rent Acts was in 1953 considerably in arrear with his rent and the landlord started proceedings to recover possession. By consent, the county court judge made an order dated December 2, 1953, following Form 138 in the appendix to the County Court Rules, in the following terms: "It is adjudged that the plaintiff do "recover against the defendant possession of the land . . . . And "it is adjudged that the plaintiff do recover against the defen"dant the sum of £36 4s. 8d. for arrears of rent and mesne profits "and £11 8s. for costs making together the sum of £47 12s. 8d. . . . "It is ordered that the judgment for possession shall not be enforced "for twenty-eight days and for so long thereafter as the defen"dant punctually pays to the plaintiff or her agent the arrears of "rent, mesne profits and costs by instalments of £10 forthwith "and 13s. 7d. per week in addition to the current rent. And it "is ordered that the judgment for £36 4s. 8d. and costs shall not "be enforced for so long as the defendant pays the said instal"ments of 13s. 7d. per week. And it is further ordered that the "judgment shall cease to be enforceable when the arrears of rent, "mesne profits and costs referred to above are satisfied." Then underneath appeared the following: "Current rent £1 6s. 5d. per "week. Arrears to date of judgment £36 4s. 8d."

The tenant did not keep up the payments directed to be made by that order, but the landlord took no steps to enforce it before the death of the tenant on January 26, 1955. In these proceedings the landlord claimed possession against the defendant, who had been living on the premises when the tenant died. It was admitted that she was a member of the tenant's family within section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:—

*Held,* (1) that, on its true construction, the order of December 2, 1953, was not a final order for possession and that neither that order nor the tenant's default in compliance with it had put an end to the statutory tenancy and, accordingly, that that tenancy was transmitted on the death of the tenant, by virtue of section 12 (1) (*g*), to the defendant.

*American Economic Laundry Co. Ltd.* v. *Little* [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186 distinguished.

(2) That though the defendant was not herself bound by the terms of the order, nevertheless she had stepped into the shoes of the tenant for all the purposes of the Acts and that the effect of the definition in section 12 (1) (*g*) and of section 15 (1) of the Act of 1920 was that her right of occupation was subject to any order which had been made under section 4 (2) of the Act of 1923, and her tenancy was accordingly subject to the incidents attaching to the tenancy of the original tenant at his death, including those imposed by the order of December 2, 1953.

*Bolsover Colliery Co. Ltd.* v. *Abbott* [1946] K.B. 8; 61 T.L.R. 514 considered.

Form of the county court orders for possession in respect of premises subject to the Rent Restrictions Acts considered.

APPEAL from Judge Armstrong sitting at Poole County Court.

The plaintiff, Gertrude Lester Sherrin, was the owner of No. 124, Surrey Road, Poole, premises within the Rent Restrictions Acts, which in 1953 were in the occupation of one Gilbert Christopher Phelps as statutory tenant. He was considerably in arrear with his rent. The landlord started proceedings in 1953 for possession, and an order dated December 2, 1953, was made by consent in the following terms: "It is adjudged that the "plaintiff do recover against the defendant possession of the land "mentioned in the particulars of claim attached to the summons "in this action, that is to say," and the premises were described. "And it is adjudged that the plaintiff do recover against the "defendant the sum of £36 4s. 8d. for arrears of rent and mesne "profits and £11 8s. for costs making together the sum of "£47 12s. 8d.," and then in brackets appeared a note when the costs were taxed. "It is ordered that judgment for possession "shall not be enforced for twenty-eight days and for so long "thereafter as the defendant punctually pays to the plaintiff or "her agent the arrears of rent, mesne profits and costs by instal"ments of £10 forthwith and 13s. 7d. per week in addition to "the current rent. And it is ordered that the judgment for "£36 4s. 8d. and costs shall not be enforced for so long as the

" defendant pays the said instalments of 13s. 7d. per week. And " it is further ordered that the judgment shall cease to be " enforceable when the arrears of rent, mesne profits and costs " referred to above are satisfied." Then underneath appeared the following: " Current rent £1 6s. 5d. per week. Arrears to " date of judgment £36 4s. 8d."

The tenant died on January 26, 1955, not having complied with the terms of the order of December 2, 1953. In these proceedings the landlord claimed possession against the defendant, Joyce Brand, who was living in the premises at the date of the tenant's death. It was not disputed that, if the tenant was a statutory tenant at his death, the defendant would be entitled to succeed to the statutory tenancy as a member of his family within section 12 (1) (*g*) of the Act of 1920.

The county court judge made an order for possession, holding that the order of December 2, 1953, was a final order for possession and that the original statutory tenancy had determined.

The defendant appealed.

*Claude Duveen Q.C.* and *James R. B. Fox-Andrews* for the defendant. The court is asked here to decide the point left open in *Mills* v. *Allen*,[1] namely, whether, if a conditional order for possession is made in respect of rent-restricted premises and the statutory tenant dies before it has been complied with, a member of his family can nevertheless succeed to his statutory tenancy under section 12 (1) (*g*) of the Act of 1920. It is submitted that the deceased tenant, Mr. Phelps, was still a statutory tenant at his death, notwithstanding the order for possession of December 2, 1953, and that he had not entirely complied with the terms of that order. The effect of that order was to give to the landlord the right to go back to the court for an unconditional order for possession, and the statutory tenancy continued until she did that. In fact she never applied for an absolute order. Alternatively, if the order of December 2, 1953, did determine the statutory tenancy, immediately the landlord accepted a further payment of rent a new contractual tenancy came into being. The defendant, as the successor of the deceased tenant under section 12 (1) (*g*), is under no obligation to pay the arrears of rent; such arrears were the personal obligation of the deceased tenant.

The order of December 2, 1953, was a conditional order and this case is distinguishable from *American Economic Laundry*

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[1] [1953] 2 Q.B. 341; [1953] 2 All E.R. 534.

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*Ltd.* v. *Little*,[2] where the order under consideration was an unconditional order. The decision in *Tickner* v. *Clifton*[3] shows that a person claiming under section 12 (1) (*g*) holds under a new statutory tenancy and not under the original statutory tenancy. The fact that the original statutory tenant was in arrears with rent is not a ground for ejecting a tenant claiming under section 12 (1) (*g*). Where a conditional order for possession is made, there is no need to invent a new statutory tenancy since the original tenancy is not determined by the order. The order made in this case followed Form 138 in the appendix to the County Court Rules. The term "absolute" order for possession is wrong. The correct term is "final" order for possession. When such order is made, the landlord can enforce it on the day named. The difference between the form of the order in the present case and that made in the *American Laundry* case[4] is that in the latter case a warrant for possession could have issued. The order could not have been enforced in this case. The landlord would have had to go back to the court. The law does not recognize that a man may be in possession under an order paying rent. The so-called conditional order for possession is not an order for possession at all. It is merely a warning to the tenant of the consequences which will follow if he does not comply with the terms of the order. Even if the court construed this order as an absolute order for possession, this case still would be different from the *American Laundry* case,[4] since possession under this order was postponed to an indefinite date. On that footing the statutory tenancy continues until the tenant gives up possession or is dispossessed.

It is submitted that, having regard to the decision in *Tickner* v. *Clifton*,[5] the defendant is not liable for the arrears of rent but, if it were held that the condition as to their payment in the order of December 2, 1953, were binding on her, she would be willing to pay such arrears. [*Haymills Houses Ltd.* v. *Blake*[6] was referred to.]

*James R. B. Fox-Andrews* following. If the court were to hold that a tenant continuing in possession under an order of this kind were not a statutory tenant, subtenants would, as a result, become tenants holding directly from the landlord and there would have to be an apportionment of the standard rent between such subtenants and the person remaining in possession under the order. Should the order be discharged, the question would arise as to the then position of such subtenants, would they then again become the tenants of the original tenant? There is the further difficulty that a statutory tenancy once determined cannot be revived: *John M. Brown Ltd.* v. *Bestwick.*[7] If the statutory tenancy were determined by the order, the tenant would become a mere licensee and he could not grant subtenancies.

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[2] [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186.

[3] [1929] 1 K.B. 207; 45 T.L.R. 35.

[4] [1951] 1 K.B. 400.

[5] [1929] 1 K.B. 207.

[6] [1955] 1 W.L.R. 237; [1955] 1 All E.R. 592.

This order was a consent order and was not enforceable by the landlord without a further application to the court. This is not a case where the tenant was in default. No suggestion of default was made until after his death. [Reference was made to the County Court Rules, Ord. 25, r. 72.]

*Scott Henderson Q.C.* and *Michael King* for the landlord. The order of December 2, 1953, was an absolute and final order. The payments made under it by the tenant were not rent but payments which the tenant had to pay for remaining in possession. If the tenant made default, the landlord could have put the machinery of the court in motion to enforce the judgment for possession. In such a case no further order of the judge would have been necessary. The registrar, however, might refer the matter to the judge. Where the tenant makes default, his right of occupation ceases. If the court had intended merely to warn the tenant of the consequences of defaulting in his payment, it could have adjourned the proceedings. At common law a tenant's right to possession may cease: (1) when the term comes to an end; (2) when notice to quit is served; (3) when the lease is forfeited. If there is a forfeiture, a court order is necessary. In the first and second cases the tenant's right to possession ceases and he stays on in possession as a trespasser. If the landlord gets an order for possession, between the date of the order and its execution the tenant is still a trespasser. The court has an inherent jurisdiction to give a trespasser a reasonable time in which to leave. If the term has come to an end, a tenant who stays on is a trespasser, and if the landlord can obtain possession by any legal means he is entitled to do so: *Clifton Securities Ltd.* v. *Huntley.*[8] The right to continue to occupy premises when a lease has determined is a right given by the Rent Restriction Acts. When judgment for possession is given, the right to occupy under the Acts comes to an end. [Reference was made to section 4 (2) of the Rent Restriction Act of 1923 and to section 119 of the County Court Act, 1934.]

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[7] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

[8] (1948) 64 T.L.R. 413; [1948] 2 All E.R. 283.

If the tenant gets the order discharged, he would again have a right to occupy under the Acts. While the order operates a subtenant comes into direct relationship with the landlord and must pay rent to the landlord under section 15 (3) of the Act of 1920.

There is no automatic discharge of an order such as was made in this case, even if all its conditions are fulfilled. This order follows Form 138 in Appendix A to the County Court Rules. If a tenant does not comply with the conditions in such an order, Form 158A of the County Court Forms applies and under Ord. 25, rr. 71 and 72, the landlord can obtain execution for the money debt and possession. The registrar has jurisdiction to make the order.

The power conferred by section 119 of the County Court Act, 1934, to suspend execution is similar to the power conferred by the Rent Restriction Acts. If the court does not wish to make an order for possession, it should stand the case over on terms that the tenant continues the payments, with liberty to restore. While it is admitted that there is power to make a conditional order for possession, it is submitted that such an order brings the statutory tenancy to an end. When the judgment is set aside or discharged, the statutory tenancy revives. Until then the tenant is in possession under the order, not as statutory tenant. Section 15 (1) of the Act of 1920 defines a statutory tenant as a person who by virtue of the Act is in possession. It does not include a person who is in possession by the indulgence of the court.

This order is, in effect, similar to that considered in the *American Economic Laundry* case.[9] Here the condition is one staying the operation of the order. It is not a condition which must be complied with before the order is effective. This is an absolute order for possession. There is no doubt but that that was the order the judge intended to make. In section 12 (1) (*g*) of the Act of 1920 "tenant" refers to section 15 (1) and means a person who retains possession by virtue of the provisions of the Act. The deceased tenant did not remain in possession by virtue of the provisions of the Act. He was in possession owing to the indulgence of the court. Any member of his family succeeding to him under section 12 (1) (*g*) will not be liable for his arrears of rent. Such successor would under section 15 (1) take upon the terms of the original tenancy. The defendant would only be liable to pay the statutory rent. The court cannot impose any obligation on her to make additional payments.

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[9] [1951] 1 K.B. 400.

*Michael King* following. With regard to the defendant's concession that she is prepared to pay the arrears, in *Bolsover Colliery Co. Ltd.* v. *Abbott* [10] it was held that arrears of rent were a debt owing by the deceased tenant. There is nothing in the Act which annexes the debt to the tenancy so as to run with it. If the defendant had to pay the arrears, this would amount to an increase in the rent. In the *American Economic Laundry* case [11] the tenant died before he had carried out the court's order. Here the tenant has defaulted in complying with the order of the court. The *American Economic Laundry* case [11] governs this case. [Reference was made to *Moodie* v. *Hosegood.*[12]]

*Claude Duveen Q.C.* in reply. The essential point in this case is whether the admitted default of the original tenant determined the tenancy or whether it is necessary for the landlord to go into possession before the statutory tenancy is determined. It is submitted that the latter is the true view. If the default determined the tenancy, what was the sanction for the payment of rent for the period named in the order? The order imposed no obligation to pay rent. Execution could have been levied for the rent in arrear. The deceased tenant was paying rent by virtue of his statutory tenancy. It was contemplated that this order would operate for 55 weeks. The deceased tenant was in occupation for 50 weeks before his death. If he were not in possession during that period as statutory tenant, the landlord could not have increased rent, had the rates been increased. [Reference was made to *Merrick* v. *Lenihan.*[13]]

EVERSHED M.R. This case has raised problems of no little difficulty both as regards the substance of the enacted law under the Rent Restrictions Acts and also as regards the procedure of the county court under those Acts. The question is whether the defendant, a Miss Joyce Brand, is entitled to any and, if so, what protection under those Acts (she being admittedly within the class by definition of "tenant" in section 12 (1) (*g*) of the Rent Restriction Act of 1920), having regard to the fact that the previous statutory tenant, through whom she claims, as it were, to succeed by virtue of the definition, was a person against whom an order for possession had been made in respect of the premises in question, No. 124, Surrey Road, Poole.

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[10] [1946] K.B. 8; 61 T.L.R. 514.

[11] [1951] 1 K.B. 400.

[12] [1952] A.C. 61; [1951] 2 T.L.R. 455; [1951] 2 All E.R. 582.

[13] [1950] Estates Gazette Digest 277; 156 Estates Gazette 68.

I do not want at this stage to give to the order to which I have alluded any of the epithets which have been used—"absolute," "conditional," or "suspended." But the fact is that, at the date of the death of the previous statutory tenant, he had not, on the one hand, duly complied with the terms imposed by the order on him, and, on the other hand, the judgment, which had been obtained by the plaintiff, had not been executed, and no steps had been taken by her to execute it.

The person I have called the previous statutory tenant was one Gilbert Christopher Phelps, and he died on January 26, 1955. The defendant, Miss Brand, is admittedly a member of his family within the scope of the definition in section 12 (1) (*g*) of the Act of 1920. Mr. Phelps was a man well advanced in years. We were informed that he was an old-age pensioner, and his resources appear to have been insufficient to enable him to pay the rent of £1 6s. 5d. a week in respect of the house. At any rate, he did not do so. At the date of the order of December 2, 1953—on the interpretation and effect of which the whole of this case turns—there was about six months' rent unpaid and in arrear.

Proceedings were accordingly started by the landlord, Miss Sherrin, and the order to which I have referred is expressed to have been made by consent. It reads as follows: [His Lordship stated the terms of the order and continued:] It was the view of the judge that the effect of this order was of a peremptory character. The appropriate passage in his judgment is as follows: "These orders have, as far as my experience goes, "always in the past been treated in the following way. If the "conditions are complied with and the arrears paid off, the "order is automatically discharged, and on any further default "in payment of current rent fresh proceedings have to be started. "On default, and on proof to the court of default, leave is "normally given for the warrant to issue." Then a little later: "I should myself have regarded the order as a final order for "possession, defeasible on satisfaction of the arrears, with execution stayed on terms. This I regarded as a reasonable order "to make in the circumstances, and the plaintiff was, in my view, "entitled to ask for a final order, and it would not have been "reasonable to adjourn the case on terms."

With all respect to the judge, I somewhat doubt his interpretation of the order. It is no doubt true that Phelps may have had no defence or answer to the claim for arrears of rent, and that the landlord was acting not without some feelings of benevolence in the matter. Still, the order was a consent order. Furthermore, the substance and intent of it, as I read it, was as follows: that Phelps was to remain on as tenant subject, however, to the added obligation, as a condition of his so doing, that he had to pay off the arrears (for which judgment against him was given) by instalments, together with costs; and subject also to this, that, if default was made, the plaintiff could then take the appropriate steps mentioned by getting a warrant to execute the order without further or separate proceedings.

That such was the intended effect of the order, and particularly that Phelps should continue as tenant—which is for present purposes of the highest importance—seems to me to be corroborated on the face of the order whereby, as it will be recalled, the 13s. 7d. was to be paid in addition to the current "rent" stated as being £1 6s. 5d. a week, and also by the subsequent payment in fact of sums for rent by Phelps, and the receipts given therefor in terms for rent by the landlord.

The order follows in fact Form No. 138, which is found as an appendix to the County Court Rules, 1936, in the County Court Practice, a circumstance to which I shall briefly return later. It is also, on the face of it, stated to be suspended. At the top left-hand corner I read: "Order for recovery of land suspended under "Rent and Mortgage Interest Restrictions Acts, 1920 to 1939." That description is certainly accurate in that, on the face of it, the execution of the judgment or order was suspended; and since also the right to enforce was conditional on default—or, put the other way, the right on Phelps's part to remain on in possession and not to have the order enforced against him was conditional on punctual payment of the instalments of arrears, the order clearly, therefore, earns also the adjective "conditional." Until the happening of the condition, or the failure to fulfil it (according to the way one looks at it) the judgment was unenforceable; and if in fact all the arrears had been paid off, the judgment would have been a brutum fulmen, since it would have been for ever unenforceable. What, then, would have been its effect (if any) may be uncertain; but I am not sure that the logical conclusion of the landlord's argument is not that even so, and even if the judgment had been discharged—though perhaps otherwise if it had been rescinded—Phelps would at that point of time have become a trespasser liable to eviction at once and altogether without the protection of the Rent Acts.

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To complete the facts: on the death of Phelps on January 26, 1955, approximately only half of the amount of arrears had been discharged. The right to enforce the judgment according to its terms had arisen some time before, but it had not been enforced by the landlord up to the date of his death for, no doubt, laudable motives, and she had continued up to that time to accept and give receipts for rent. The question then is: Can the defendant now claim to be the tenant under the Acts of the premises No. 124, Surrey Road, Poole? This is not the first time that a problem of this character has come before the Court of Appeal; but before I refer to the two earlier cases to which our attention was directed, I must make some reference to the general scheme of the Rent Acts, and to certain specific provisions of those Acts—though let me acknowledge that much of what I am about to say has been said before. Thus, it has been said many times that the expression "statutory tenant" is one not found in the Acts. The phrase is a useful way of describing compendiously an individual who, as regards a dwelling-house as defined in the Acts, has what Scrutton L.J. called a status of irremovability by virtue (but subject to the provisions) of those Acts.

The nature of these rights and obligations finds expression in section 15 (1) of the Act of 1920: "A tenant who by virtue "of the provisions of this Act retains possession of any dwelling-"house to which this Act applies shall, so long as he retains "possession, observe and be entitled to the benefit of all the "terms and conditions of the original contract of tenancy, so "far as the same are consistent with the provisions of this Act, "and shall be entitled to give up possession," etc. One of the provisions of the Act referred to in this section is, as I think, what is now section 4 (2) of the Act of 1923: "At the time of the "application for or the making or giving of any order or judgment "for the recovery of possession of any such dwelling-house, or "for the ejectment of a tenant therefrom, or in the case of any "such order or judgment which has been made or given, whether "before or after the passing of this Act, and not executed at "any subsequent time, the court may adjourn the application, or "stay or suspend execution on any such order or judgment, "or postpone the date of possession for such period or periods "as it thinks fit, and subject to such conditions (if any) in regard "to payment by the tenant of arrears of rent, rent, or mesne "profits and otherwise as the court thinks fit, and, if such "conditions are complied with, the court may, if it thinks fit, "discharge or rescind any such order or judgment."

It is always within the jurisdiction of the court, in my judgment (assuming that the conditions for the exercise of the jurisdiction have arisen) to make an order for possession, but to postpone the effectiveness of the order by making the continued occupation of the tenant conditional, for example, on his paying arrears of rent and costs in such manner as is provided by the order—such a provision being within the language which I have read from section 4 (2)—or to postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions, in regard to payment by the tenant of arrears of rent and otherwise, as the court thinks fit. That indeed is, as I think, plainly the effect of the order of December 2, 1953; and, if that is the effect of the order, it certainly does not necessarily involve the result (as I read section 15 (1)) that, during the period of the postponement of possession, the so-called statutory tenancy ceases altogether, and the tenant wholly ceases to have the protection of the Act.

I need not read section 12 (1) (*g*), for its terms are well known. It takes the form of a definition, inter alia, of the word "tenant." It is common to speak of a succession to or transmission of the statutory tenancy; but this expression, though again a convenient formula, is, in truth, not strictly accurate; the statutory tenancy so-called, having no proprietary quality, is incapable of transmission in law. The more correct and strict view is that when we speak of a tenant having the rights and obligations indicated in section 15 (1)—as they are or may be affected by the exercise of the powers conferred by section 4 (2) of the Act of 1923—the tenant is not confined to the individual in occupation when the original contractual tenancy came to an end, or the individual against whom an order is made under section 4 (2) of the Act of 1923, but includes such member of that person's family who, after his death, may satisfy the qualification of the definition section 12 (1) (*g*).

With this introduction, I turn to the first case, *American Economic Laundry Ltd.* v. *Little*,[1] in which, as in the present case, an order for possession was made against the occupying tenant; but the tenant died before the date fixed by the order made had occurred. The question was whether the defendant (who was admittedly a member of the deceased's family) could continue in occupation by virtue of section 12 (1) (*g*). We have not seen the actual form of order made in the *American Economic Laundry* case,[1] nor is it precisely set forth in the report of the case in this court in The Law Reports. But it is quite clear from that report (and I think also from the report of the county court judge's judgment, which we were shown by Mr. Duveen) that in vital respects it differed from the order made in this case on December 2, 1953. In the *American Economic Laundry* case [1] there was no question of any condition—that is, no question of its enforceability being conditional on the tenant's failure to pay the arrears—still less was there any question of the order becoming in any event altogether unenforceable, if the tenant performed all the obligations put upon him by the order. The order, though the date was twice extended, was always a simple unqualified order to take effect on a future date mentioned, April 3, and the tenant died on March 8 before the date had arrived. Mr. Scott Henderson may be right in saying that the distinctions to which I have referred (and which are referred to in the judgment) between "absolute" and "conditional" orders may in part have been the invention of Mr. MacDermot, the counsel in the case. None the less, it is clear to my mind that the order in the *American Economic Laundry* case [1] could fairly be described (in contrast to the order in the present case) as "absolute" in the sense that the plaintiff's right to possession was not qualified by reference to conditions or contingencies.

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[1] [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186.

Hence Somervell L.J., who delivered the leading judgment of the court, though he thought that the order operated to put an end to the tenant's right to remain in occupation under the Act, reserved the question what would be the effect of an order, such as we have here, a so-called "conditional" order. After saying that the tenant, after the making of the final order, might be regarded as being in possession by licence of the court, the Lord Justice went on [2]: "I agree with my brother Jenkins' "observation, made in the course of the argument, that the "position of someone against whom an order for possession has "been made, and then suspended at common law or under "section 5 (2) of the Rent Act of 1920"—and that is the same as section 4 (2) of the Act of 1923—"is sui generis. I do not "think that the problem which we have to solve is really "assisted by considering in what respect his position is the same "quoad the landlord as it was before the order was made. It "is obviously fundamentally different in this respect, that, "whereas before, he was entitled to the protection of the Act

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[1] [1951] 1 K.B. 400.

[2] Ibid. 404.

"until successful proceedings were taken, he is now in the "position that proceedings have been taken and that an order "for possession has been made. All that he has is a right to "apply for postponement under section 5 (2). In my opinion "a tenant in that position, that is to say where an absolute "order for possession has been made against him, notwithstanding that it may be suspended, is not a tenant for the purposes "of section 12 (1) (*g*)."

Somervell L.J. then referred to *Bolsover Colliery Co. Ltd.* v. *Abbott*,[3] and in reference to that case, he proceeded[4]: "The "headnote (in The Law Reports) illustrates the similarity between "that and the present case. It was '*Held*, that the father's "'tenancy was subject to defeasance by the plaintiffs on his "'ceasing to be in their employment by virtue of the provisions "'of paragraph (*g*) (i) of the Rent and Mortgage Interest "'Restrictions (Amendment) Act, 1933; that, when the defendant succeeded to that tenancy, it remained subject to the "'same defeasance; and therefore the plaintiffs, having established that they required the house for occupation by a person "'in their whole-time employment, were entitled to an order for "'possession.'"

Somervell L.J. went on: "At the conclusion of his judgment "Scott L.J. said[3]: 'The right of the landlord and the liability "'of the tenant are co-extensive in that respect, and a tenancy "'carried on by the provisions of the Act as to the succession "'of a widow or other relation is the same tenancy with its "'advantages and disadvantages unaltered. I therefore think "'that the appeal should be allowed.'"

The Lord Justice said this[5]: "Mr. MacDermot, who, the "defendant being in person, assisted the court by putting the "arguments on both sides, referred to the fact that, under "section 5 (2) of the Act of 1920,"—that is, section 4 (2) of the Act of 1923—"orders for possession may take either of two "forms: there may be, as here, an absolute order the execution "of which is suspended: or there may be a conditional order, "that is to say, the order for possession does not become "operative so long as certain conditions are fulfilled, for example, "payment of rent or abatement of a nuisance. The difference "between those two kinds of order is illustrated by these concluding words of the subsection: 'if such conditions,' that is "to say, conditions to which an order is made subject 'are

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[3] [1946] K.B. 8; 61 T.L.R. 514.
[4] [1951] 1 K.B. 400, 405.
[5] Ibid. 406.

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" 'complied with, the court may, if it thinks fit, discharge' the " order. That cannot be done when an absolute order has been " made; it can only be done if the order is made conditional. I " have only referred to that matter in order to make it clear that " I am not deciding what the position would be in a case of this " kind where a conditional order had been made against the " deceased tenant: it may be that the result would be the same; " it may be that it would be different."

Jenkins L.J. expressed his agreement with Somervell L.J., but he also added, after stating what was the character of the statutory tenant's interest[6]: "That being the character of " the statutory tenant's interest after the order for possession has " been made, what effect, if any, can be given to section 12 (1) " (*g*), under which, on the death of a statutory tenant, a member " of the tenant's family residing on the premises becomes the " statutory tenant? It was held by the judge that that provision " still remained of full force and effect, and that the defendant " here became, on the death of her father, the statutory tenant " under a new statutory tenancy which was hers and nobody " else's, and which would continue to be enjoyed by her in her " own right until such time as some new ground for claiming " possession arose and the landlords successfully applied for and " obtained an order for possession. That would be, to my mind, " a most surprising result; and, notwithstanding the reasons to " the contrary stated by the judge, I agree with my Lord that " there is really no warrant for the judge's conclusion on a consideration of the relevant statutory provisions.

" I agree that the right principle to be followed is that stated " in *Bolsover Colliery Co. Ltd.* v. *Abbott*,[7] which shows that " the member of the family who becomes statutory tenant on " the death of the original tenant, although in a sense claiming " in his or her own right, that is to say, although not claiming " under the statutory tenant in the same way as an assignee or " legatee of a contractual tenancy may be said to claim under " the grantor or testator, nevertheless becomes statutory tenant " under the same tenancy by virtue of which the original " statutory tenant was in possession. Thus in the present case, " assuming in the defendant's favour that notwithstanding the " existence of the final order for possession, she could still become " statutory tenant of the premises by virtue of section 12 (1) (*g*) " of the Act of 1920, it seems to me at all events clear that the " tenancy to which she in effect succeeded could be no more than

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[6] [1951] 1 K.B. 400, 407.

[7] [1946] K.B. 8.

"the limited interest remaining to run between the date of the "death and the expiration of the date fixed for possession by the "order." My brother Birkett expressed concurrence with both Somervell L.J. and Jenkins L.J.

This court, therefore, held that the order in the form which I take it to have taken in the *American Economic Laundry* case[8] necessarily had the effect—either immediately upon its being made, or when by its terms it took effect—that it put an end to any right under the statute or otherwise of the tenant to remain in occupation.

In the later case of *Mills* v. *Allen*[9] a similar question had arisen, where the order had been in a form corresponding to the order in this case. In the event it was unnecessary for the court to decide the question left open by Somervell L.J.; but in the course of my judgment I drew attention to the difficulties which (it seemed to me) would be likely to arise in reference to section 12 (1) (*g*) from orders of the kind here in question, and from the distinction said to exist between absolute and conditional orders. Amongst other things, I asked what the position would be in the case of a so-called absolute order if, before it took effect, the court exercised the power which it appears to have under the Act of 1923, in effect, to convert it into a conditional order. I suggested (and nothing in this case has altered my view) that if what the court really desires to do is to put the tenant on terms as to continuing in occupation, then it is a more convenient form of order to adjourn the application on terms that the tenant either pays, or undertakes to pay, the arrears punctually, with liberty to the plaintiff to apply for an order for possession if default is made in carrying out the terms of the order. It is true, as Mr. Scott Henderson pointed out, that a certain sanctity is given to the present form of order, whether wisely or unwisely, by the County Court Rules; but it cannot, I think, be suggested that it is outside the jurisdiction of the county court judge to adjourn an application on terms such as I have suggested, and certainly in that event the main difficulty presented by the present case would be avoided altogether.

As I have touched on these general questions of jurisdiction, it is perhaps right that I should deal (though I shall do so very briefly) with two matters put by Mr. Scott Henderson. He first drew attention to the undoubted law, as it was expressed, for example, by Denning L.J., when at first instance, in *Clifton*

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[8] [1951] 1 K.B. 400.

[9] [1953] 2 Q.B. 341; [1953] 2 All E.R. 534.

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*Securities Ltd.* v. *Huntley*,[10] that in cases unaffected by the Rent Acts, where in forfeiture proceedings an order is made for possession at a future date, the rights of the tenant, as such, end from the date of the order itself. So, it was said by Mr. Scott Henderson, is it by analogy in Rent Act cases—the rights of the tenant under the statute are at an end from the making of the order, and the determination of those rights does not wait until its later execution. In my judgment, the analogy is not a true one, and ignores the peculiar circumstances of Rent Act cases. The rights of the tenant do not depend on any proprietary interest or even upon a contract, but upon the special terms and provisions of the statutes, including the provisions of section 4 (2) and any order made in pursuance of the jurisdiction of that section.

Second, Mr. Scott Henderson drew our attention also to the procedure contemplated by the County Courts Act, 1934, and the rules made thereunder for executing orders for possession, including the terms of Form 200 (warrant for possession of land), County Court Practice, 1955, p. 613. I agree that the provisions of the rules and forms appear to contemplate the issue of a warrant by the registrar without further order by the judge. It was said that in practice the further order for possession, or for the issue of the warrant, is normally made by the judge himself. That may or may not be so. It is, however, in my judgment, not necessary to pursue this aspect of the matter, for it does not appear to be relevant to the question which we have to decide.

I return accordingly to that question. The decision in the *American Economic Laundry* case[11] is, of course, binding upon us. But, for the reasons which I have given, the order in the present case made on December 2, 1953, is different in essential respects from the order made in that case. In my judgment, the reasoning which led to the result in the *American Economic Laundry*[11] case is, therefore, not applicable in the present case; and I conclude, accordingly, that the order of December 2, 1953, did not then and there put an end to the rights of occupation—that is, the so-called statutory tenancy of Mr. Phelps—and that since that order had not been executed in fact, and no steps had been taken to that end by the date of his death, Mr. Phelps, when he died, was still a statutory tenant of No. 124, Surrey Road, Poole.

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[10] 64 T.L.R. 413; [1948] 2 All E.R. 283.

[11] [1951] 1 K.B. 400.

I would add that if this is not so, then, in cases of this kind, two very strange results would appear to follow, which can be put in the form of questions: (1) What happens under such an order as this if all the arrears are paid off? Mr. Duveen, in opening the case, suggested that a new contract, a new contractual tenancy, then came into existence once one instalment of rent had been paid and accepted. Mr. Scott Henderson said that the statutory tenancy revived. I find difficulty in accepting either suggestion; but, fortunately, having regard to the view I take, the question need not be answered in either sense. Further, (2) What is the position of a lawful subtenant under section 15 (3) of the 1920 Act of part of the premises? If Mr. Scott Henderson is right, then from the date of the making of the order, the subtenant becomes the direct tenant of the landlord. Again, what happens if the order is complied with and becomes wholly unenforceable? Does the statutory tenant spring back to his original position of subtenancy? And what happens, during the time that the order operates, as regards that part of the rent for the whole of the premises payable by the tenant attributable to the part occupied by the subtenant? Must there be some apportionment? The example was pressed in argument by Mr. Fox-Andrews to further stages of elaboration which illustrate the increasing difficulty which would arise if the plaintiff's view of this matter is correct; but I do not pursue it further.

Therefore on the first and main point I hold that the order, being in the form with which we are here concerned, did not put an end to the so-called statutory tenancy of Mr. Phelps; and whether the tenant against whom such an order is made dies before or after any default in compliance with the order makes in this respect no difference. If so, then, to use the convenient but inaccurate phrase, the statutory tenancy will be transmitted by virtue of section 12 (1) (*g*) to the person qualifying by virtue of that definition.

But that is not an end of the matter, for if, in the present case, the defendant is entitled to succeed to the statutory tenancy, on what terms does she do so? It is no doubt true that she is clearly not bound by the order; she was not a party to the proceedings, and the debt for which judgment was given was not her debt. So much is well established and illustrated by the case of *Tickner* v. *Clifton*.[12] But it does not follow, in my judgment, that the defendant becomes a statutory tenant without any regard to the order of December 2, 1953, able to make, as it were, a fresh start from January 26, 1955, as though that order had never been made. Mr. Duveen, in opening the case, first indeed so contended, but later he resiled from that view, and now concedes (and in my judgment rightly concedes) that the so-called tenancy, to which the defendant became entitled, is the tenancy as it existed immediately before the death of Phelps, with and subject to all the incidents then attached to it, including those imposed by the court in the exercise of its powers under section 4 (2) of the Act of 1923. At the relevant date the so-called tenancy had, as the result of the order, an infirmity, namely, that if default were made (as in fact it had been) in paying off the arrears, then the landlord was entitled, by virtue of the order, to apply at once for a warrant for possession. It is true, of course, that the landlord cannot apply now in that action for a warrant of possession against the defendant. She must start fresh proceedings against the defendant asking for possession; but that is merely a matter of procedure occasioned by the fact that Phelps is dead. Immediately before his death, she had the right under the order to apply for immediate possession, which prima facie she would have been entitled to obtain. In proceedings against the defendant she can so assert, and she can allege any other facts which have occurred since. I do not think that the landlord's right—which I have tried to formulate—has been altogether lost by the death of Phelps.

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[12] [1929] 1 K.B. 207; 45 T.L.R. 35.

On the other hand, I think that my conclusion results from a true view of the Acts, and especially section 15 (1) and section 12 (1) (*g*) of the Act of 1920. The former section defines the statutory rights of occupation which the tenant has, and, as I have said, those rights seem to me to comprehend any orders which may have been made under section 4 (2) of the Act of 1923. Clearly during the latter part of Mr. Phelps's life, and after the order of December 2, 1953, had been made, a description of his rights under the statute to the occupation of No. 124, Surrey Road, Poole, would have been incomplete and inaccurate without any reference to the order which had been made in December, 1953, under section 4 (2) of the Act of 1923.

The effect of section 12 (1) (*g*) is not, in my judgment, to create some new tenancy—so much was pointed out by Scott L.J. in the *Bolsover* case[13]—nor even to provide strictly for transmission, as I have said, from the previous occupant. The effect is that by definition the "tenant," having the rights I have described under section 15 (1), includes in this case the defendant.

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[13] [1946] K.B. 8.

She, as it were, steps into the shoes of Phelps and takes his place for all the purposes of the Acts.

I add, first, that the result does not, as I think, constitute any increase of the standard rent, either during Phelps's life after the order was made, or after his death. The sums, payment of which the tenant was required to make as a condition of continued occupation, are what they were stated in the order to be, arrears of rent and costs. Nor, second, is my conclusion inconsistent, as Mr. King argued, with the decision in the *Bolsover* case,[13] which has been referred to in the passages that I read from Somervell L.J.'s judgment in the *American Economic Laundry* case.[14] In the *Bolsover* case,[15] the rights of the statutory tenant depended upon his being in the employment of the plaintiffs, who let the dwelling-house to him as their employee. The death of the tenant necessarily put an end to that essential condition of the tenancy; the member of the family who claimed to succeed, though ready and willing to be employed, was not employed in fact, and the condition of the tenancy was not readiness to be employed, but employment in fact. And third, as I have said before, my conclusion does not at all involve the proposition that the defendant is made personally liable under the order. The landlord may no doubt have two remedies—as a landlord would where, for example, the tenant's rent has been guaranteed by a third party. The existence and availability of the landlord's remedy against Mr. Phelps—I gather that it is in fact of no value at all—is, no doubt, a matter which the county court judge would consider on any application for possession against the defendant. I cannot, therefore, see that this point creates any difficulty. Nor, I think, does any difficulty arise from the fact that, if the defendant pays the rent and arrears, she may have a claim for indemnity against the estate of Mr. Phelps.

The view that I have expressed follows the reasoning of Jenkins L.J. in the *American Economic Laundry* case [16] set out in the passage which I have already quoted, with which I agree and which I respectfully adopt. The result also seems to me in accordance with good sense, principle and the justice of the case. If the landlord had, shortly before Phelps's death, obtained under the order of December 2, 1953, the right to have the order enforced, but refrained from exercising it out of proper feelings for Phelps, who was then on his death bed, it seems to me a hard thing (and contrary to good sense) that she should now have altogether lost the right to the benefit of the order. Moreover, where one person succeeds in any sense to rights vested in another, then prima facie the former cannot and should not get a higher or better right than that enjoyed by the so-called predecessor.

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[13] [1946] K.B. 8.

[14] [1951] 1 K.B. 400.

[15] [1946] K.B. 8.

I therefore conclude, with all respect to the county court judge, that he was wrong in holding that the defendant was a mere trespasser outside the scope of the Acts, and in ordering possession accordingly. Her right to become statutory tenant on Phelps's death was, however, qualified in the way that I have stated by virtue of the order. That, however, is an aspect of the matter which has not been considered by the county court judge, and it would not be right for me to attempt to fetter his statutory discretion in regard to it. I think, therefore, the appeal should be allowed.

BIRKETT L.J. I agree with the judgment delivered by the Master of the Rolls, which has covered the matter so fully that there is very little that need be added. The point at issue illustrates again what Jenkins L.J. once called the infinite variety of questions which arise under the provisions of the Rent Acts; and, although this point has been discussed and considered, it is necessary in the present case to come to a decision in regard to it.

There are really two questions to determine: (1) Is the defendant a tenant of these premises at No. 124, Surrey Road, in Poole; and (2), if she is a tenant of those premises in special circumstances, upon what terms does she hold? What are the terms of the tenancy? Those questions on the face of them sound simple enough; but we have listened to lengthy arguments on decisions in previous cases, on the county court practice, on the technicalities of warrants for possession, and various other matters, all with the desire, I am quite sure, to come to a proper decision in what is a rather difficult case.

The facts of the case are set out by the judge, and are happily not in dispute. The premises in question had been let to Phelps, and he was, of course, protected by the Rent Acts. But he fell into arrears with his rent, and on December 2, 1953, an order was made in the Poole County Court, which has been the subject-matter of much discussion here, in the form which had been customary in the county courts for very many years, that is to say, an order for possession in 28 days, suspended on payment of the arrears of rent by instalments of £10 forthwith and 13s. 7d. per week in addition to the current rent, the arrears to date of judgment being £36 4s. 8d., and costs ultimately taxed at £11 8s. This order was made on Phelps's own offer. Within a very few weeks he was in default under the order, and continued in default until his death on January 26, 1955.

The plaintiff did not apply to the court to enforce the order for possession, as she could have done at almost any time in 1954. It would appear that she refrained out of kindness to Mr. Phelps, who was an old age pensioner of slender means. Certain correspondence was put in before the county court judge, and it would appear to be plain that what the judge was saying was accurate—that when Phelps had written to say what his financial state was, the solicitors for the landlord wrote back showing every possible consideration. But those letters also indicated the doubt which existed about the proper answer to the question that we have to determine, for I observe in that correspondence that the solicitors for the landlord advised the defendant that, if she was the lawful widow, there was a question whether or not she would not be the tenant of the premises, and matters of that kind; and the judge himself, when he came to deal with the question, said: "The "position is obviously one of great difficulty. In one sense, no "order for possession is final in the case of protected premises in "that application may be made for a stay at any time until the "warrant for possession is actually executed; but in my view this "order was, and was intended to be, as final as possible, and "I think that as long as the arrears and costs remained undis"charged, Mr. Phelps was a statutory tenant against whom an "order for possession has been made, and there was no tenancy "in existence which could be transmitted to the defendant."

That was the position taken up by Mr. Scott Henderson in this court for the landlord, because he submitted that once this order, with which we are dealing, was made, the tenancy was forthwith ended, and that thereafter Phelps remained in the premises only by virtue of a kind of licence from the court. The first question, therefore, to be determined is what was the nature of the order which was in fact made.

It is, I think, clear from section 4 (2) of the Act of 1923 that the order which might be made by the county court judge could take various forms; and a very considerable doubt has existed (and I suppose will continue to exist, I do not know) as to what are the precise effects of any particular order being made. That subsection provides: "At the time of the application for or the "making or giving of any order or judgment for the recovery "of possession of any such dwelling-house, or for the ejectment "of a tenant therefrom, or in the case of any such order or "judgment which has been made or given, whether before or after "the passing of this Act, and not executed at any subsequent "time, the court may adjourn the application"—that is quite simple—"or stay or suspend execution on any such order or "judgment"—that was the order which was made in *American Economic Laundry Ltd.* v. *Little*,[16] to which I will refer briefly in a moment, and it is, of course, the customary order that is made every day: Judgment for possession; stay of execution for 28 days, and so on—"or postpone the date of possession for such "period or periods as it thinks fit, and subject to such conditions "(if any) in regard to payment by the tenant of arrears of rent, "rent, or mesne profits and otherwise as the court thinks fit." Stopping there, the widest possible discretion is given to the county court judge, and one can understand why it is done. He is told: "You can postpone possession if the facts warrant it; "you can postpone the date for possession for such time as you "think proper; and, moreover, you can lay down such conditions "as you think proper." Then at the end of the section come the all-important words: "and, if such conditions are complied "with, the court may, if it thinks fit, discharge or rescind any "such order or judgment."

What the Act of Parliament was clearly intending to do was to invest the county court judge with the widest possible powers, because of the infinite variety of circumstances in which people are placed in regard to their housing, and in which they are compelled to go to the county court either as landlords or as tenants. The statute says: "You can adjourn it if you wish "when the facts are such that, if you do adjourn it, that may "be an end of the whole matter. If the facts indicate that it is "the proper thing to do, you may make an order for possession. "If it is a reasonable thing to do, make it. It is quite true that "you may suspend the order"—and, as the county court judge pointed out, during that period of suspension, there may be any number of applications to the court for a suspension of the order; that, at any rate, is in a category by itself. Then the third matter is the wide discretion vested in the court for postponing the date of possession as it thinks fit for such period as it thinks fit and on such terms as it thinks fit; and if those conditions are fulfilled, the court may also, if it thinks fit, discharge the order altogether.

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[16] [1951] 1 K.B. 400.

The order with which we are here confronted is an order made in that form, and I gather that it is the only form in which it can be made, and it is to be adapted and adopted according to the circumstances of any particular case. What is here done is this. First, it is said to be an order by consent. On the one hand, one can appreciate the position of an old age pensioner, finding it a desperately hard matter even to live and to provide the rent and arrears of rent, and on the other, one can see a considerate and kindly woman as landlord saying: "I really "cannot proceed to extreme measures in respect of an old age "pensioner." By consent, therefore, it is said: "That is the "sum you owe, £36 4s. 8d., for arrears of rent; there is £11 8s. "which we now know to be the sum due for costs; that "altogether makes £47 12s. 8d. That clearly belongs to the "plaintiff. It is adjudged that the plaintiff do recover it. It is "ordered that judgment for possession shall not be enforced "for 28 days and for so long thereafter as the defendant "punctually pays to the plaintiff or her agent the arrears of rent, "mesne profits and costs by instalments of £10 forthwith and "13s. 7d. per week in addition to the current rent." Those are the conditions which were agreed, and which were approved by the county court judge. "And it is ordered that the judgment "for £36 4s. 8d. and costs shall not be enforced for so long as "the defendant pays the said instalments of 13s. 7d. per week." Then, most important: "And it is further ordered that the "judgment shall cease to be enforceable when the arrears of "rent, mesne profits and costs referred to above are satisfied."

Mr. Scott Henderson says for the landlord in this court that that is what he calls an absolute order or final order for possession, and the county court judge has said that it was intended to be as final an order as possible. In view of the form of the order in *American Economic Laundry Ltd.* v. *Little*,[17] it is quite clear that it was not, because, in that particular case, the order made was plainly a quite different order; and the passage which was read by the Master of the Rolls from Somervell L.J.'s judgment[18] indicates the distinction which was in the mind of the Lord Justice in regard to an absolute order and a conditional order. I think, for my part, that the order which was made in the present case was as described here by the Master of the Rolls, in that it certainly was not of the nature of the order with which the court was dealing in *American Economic Laundry Ltd.* v. *Little.*[18]

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[17] [1951] 1 K.B. 400, 406.

[18] Ibid. 406.

The second thing to be observed about it is this: it is quite plain that the conditions laid down were not fulfilled quite early after the order was made on December 2, 1953. I suppose that it would have been possible for the plaintiff to have gone to the court and said: "The conditions which you laid down in the "order have been broken, and we now ask for a final order for "possession." But again, it is common ground that no application was made to the court, because on January 26, 1955, Mr. Phelps died, with this order of December 2, 1953, still in being, and no application having been made to the court.

In those circumstances, what is the position now? I would like to quote from *American Economic Laundry Ltd.* v. *Little* [18] the words of Jenkins L.J., which preceded the passage cited by the Master of the Rolls. He said at the beginning of his judgment: "The tenant here died after the date of the order for "recovery of possession against him but before the expiration of "the last of a series of extensions which had been made by way "of postponement of the date on which the order was to be "complied with. What, then, was his position? It is said that, "notwithstanding the order for possession, he was still a "statutory tenant. To say that seems to me really to beg the "question. It may well be that he could be described as a "statutory tenant; but that description would not itself "accurately define his precise position, for he was a statutory "tenant against whom a final order had been made, under which "possession was to be delivered up on a fixed date, 3rd April, "1950, he having died on the previous March 8. During the "intervening period between the date of such an order and the "date fixed for delivery of possession it may very well be, and "indeed obviously must be, that the statutory tenant has certain "rights and certain obligations. For instance, he would have to "pay the equivalent of the rent during the period of his occupation between the date of the order and the date of giving up "possession. But that is not to say, and it obviously cannot be "the case, that he is still the statutory tenant for all purposes, "so as to be in the same position as if the order had never been "made. He has nothing left but the limited interest granted to "him by what may perhaps be described as the indulgence of "the court under section 5 (2), of the Act of 1920. In effect he "has a period of grace." Then follows the passage which was cited by the Master of the Rolls which follows on that particular preface, and I for my own part would desire to adapt these words of Jenkins L.J.[19] to this case: "Miss Joyce Brand who "becomes statutory tenant on the death of the original tenant, "although in a sense claiming in her own right, that is to say, "although not claiming under the statutory tenant in the same "way as an assignee or legatee of a contractual tenancy may be "said to claim under the grantor or testator, nevertheless "becomes statutory tenant under the same tenancy by virtue of "which the original statutory tenant was in possession. Thus in "the present case, assuming in the defendant's favour that "notwithstanding the existence of the final order for possession, "she could still become statutory tenant of the premises by "virtue of section 12 (1) (*g*) of the Act of 1920, it seems to me "at all events clear that the tenancy to which she in effect "succeeded could be no more than the limited interest remaining "to run between the date of the death and the expiration of the "date fixed for possession by the order."

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[18] [1951] 1 K.B. 400, 406.

Happily, in this case no question arises about the position of the defendant; and, as the judge said, it was conceded that she was a tenant within the necessary meaning of "tenant" in section 12 (1) (*g*) of the Act of 1920. But I think it is plain, as the Master of the Rolls said, that whilst she is not liable for these arrears of rent, her tenancy is subject to the same infirmities (to use the word my Lord has used) as the tenancy of Phelps at the date of his death. Her tenancy cannot, I think, be better than the tenancy that Phelps enjoyed. To use the familiar phrase, the defendant really stepped into his shoes on his death. What the future may hold, I know not. It may be that an application will be made to the county court judge in respect of this tenancy, and those matters will be matters for him to decide after hearing the various contentions of the parties.

On this appeal, I am quite satisfied that, using the phraseology which has been used, this is a conditional order, as distinct from the absolute order so described in *American Economic Laundry Ltd.* v. *Little*.[20] I believe that it was the intention of the parties that it should be so—that it should not be a final order. In my view, Mr. Scott Henderson's submission upon that matter is ill-founded, and I believe the conclusion of the county court judge on that question to be wrong.

In these circumstances, concurring as I do with the judgment of the Master of the Rolls, I agree this appeal should be allowed.

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[19] [1951] 1 K.B. 400, 407.

[20] [1951] 1 K.B. 400.

ROMER L.J. I also agree, and can express my conclusions quite briefly. The first thing to do is to ascertain the meaning of the order of December 2, 1953, having regard to the terms in which it was framed. The judge who made the order has said what he meant by it, and has indicated that he intended it to be "as final as possible." It has, however, to be borne in mind that the order was a consent order, and that its intention can only legitimately be discovered from its language. The order is that of Form 138 in Appendix A to the County Court Rules, 1936, and is apparently the only form contained in the rules which is apt for making a future or conditional or suspended order for possession. In fact at the top left-hand corner it is described as: "Order for Recovery of Land "suspended under Rent and Mortgage Interest Restriction Acts, "1920 to 1939." The first two paragraphs of adjudication are, if taken alone, unequivocal in their terms, and establish the plaintiff's right to recover against the defendant possession of the premises in question, and specified amounts for arrears of rent and costs. These paragraphs, however, are followed by three more, each of which takes the form of an order.

The first two are as follows: "It is ordered that the judgment "for possession shall not be enforced for twenty-eight days and "for so long thereafter as the defendant punctually pays to the "plaintiff or her agent the arrears of rent, mesne profits and "costs by instalments of £10 forthwith and 13s. 7d. per week in "addition to the current rent. And it is ordered that the judgment for £36 4s. 8d. and costs shall not be enforced for so long "as the defendant pays the said instalments of 13s. 7d. per "week."

In my opinion, the result of these two orders is to qualify the immediate operation which the preceding adjudications would otherwise have had by suspending their enforcement in the manner and upon the terms therein prescribed. An absolute stay was imposed on the judgment for possession for 28 days. Thereafter the judgment should not be enforced (which means that it should be unenforceable) so long as the defendant punctually paid 13s. 7d. weekly to the plaintiff or her agent in addition to the current rent; and this provision was, by the second order, extended also to the sum due for arrears of rent and costs. By the third and concluding order it was provided that, on payment of the arrears of rent and costs, the judgment should cease to be enforceable altogether.

In my opinion, the meaning and effect of this judgment, when taken as a whole, and especially in view of the concluding paragraph, is that the defendant might remain on as tenant of the premises so long as he performed the conditions as to payment of the prescribed instalments in addition to the current rent; and that, on payment of the final instalment, the operation of the judgment would automatically cease. In other words, the judgment for possession was not intended to have an immediate effect, and would never indeed take effect at all provided that the conditions as to payment were fulfilled. If this be the true meaning and construction of the order, it is clear that it cannot have resulted in determining Phelps's statutory tenancy on the date upon which it was made, for the object of the order was to preserve Phelps's position (albeit conditionally) and preservation is the antithesis of destruction.

That being, as I think, the object and effect of the order, the next question is whether the judge had power to make it. A sufficient affirmative answer to this question is perhaps afforded by the fact that the form of order is that which is contained in the appendix to the rules. But, apart altogether from that, it is clear, I think, that the order is within the authority of section 4 (2) of the Act of 1923. The embargo on the enforcement of the judgment for possession for 28 days was a "stay "of execution," and the rest of the order was, I think, either a "suspension of execution," or a "postponement of the date of "possession"—it matters not which—subject to conditions which are authorized by the subsection.

Mr. Scott Henderson contended that, if an order for possession is made in any form, the tenant ceases to be a tenant, and that there is nothing in section 4 (2) to show that Parliament envisaged the contrary. I do not think that this is right. If, after a conditional order for possession is made, the tenant ceases to be a tenant, he would not be liable thereafter for rent, and could not be sued for rent, but only for mesne profits. But section 4 (2) authorizes the court to make conditions "in regard "to payment by the tenant of arrears of rent, rent, or mesne "profits"; and "rent" in that context, following upon "arrears "of rent," and immediately preceding "mesne profits"—which is mentioned as an alternative—obviously means rent payable by the tenant in his capacity as such. Therefore the legislature contemplated, in my opinion, the survival of the status of tenant notwithstanding an order for possession which is suspended conditionally. It follows from what I have said that, if Phelps had duly performed the conditions as to payment contained in the order of December 2, 1953, his position as statutory tenant would have continued down to his death. In fact, however, he defaulted on frequent occasions in payment of the instalments, and he was in default when he died.

It appears to me, on the language of the judgment, that directly Phelps made default, the judgment for possession became enforceable; and it would appear from Form 200 in the appendix to the rules (though the practice of the county court may be otherwise) that the plaintiff need only have established this default to the satisfaction of the registrar to have obtained a warrant for possession. In fact, however, the plaintiff (from very meritorious motives) never applied for such a warrant, and never obtained one; and, therefore, this order being, as I have said, a conditional order, there never was a time when Phelps could not have asked the judge for further relief by way of again suspending execution or otherwise under section 4 (2). In these circumstances, I do not think that the order ipso facto lost its conditional character by reason of Phelps's default, and in my opinion the suspension of the order for possession was still operative at the time of his death.

The next question is whether the defendant became entitled to some, and, if so, what, tenancy of the premises when Phelps died, it being conceded that she was a member of the family for the purposes of section 12 (1) (*g*) of the 1920 Act. If the judgment for possession delivered on December 2, 1953, had been merely qualified by a stay of execution for 28 days, without more, and Phelps had died during this period, it is clear from the *American Economic Laundry* case[20] that the defendant could either have claimed no tenancy at all, or at best succeeded to a tenancy for the rest of the period. The reason, however, is that if the judgment had taken that form, the tenancy would have been determined by the order. That reason has no application to the present case, where the object of the order was not to end the tenancy, but (subject to the specified conditions) to preserve it. At Phelps's death there was a tenancy which was subsisting, and not defunct; and I can see no valid reason why the defendant should not be entitled to it by succession. I am quite satisfied, however, that she takes it subject to the order of December 2, 1953, in so far as the provisions of that order are applicable to her as a tenant. The defendant is not, of course, personally subject to the judgment for possession or for payment of the arrears of rent or costs, for they were made against Phelps alone, and she was not a party to the proceedings. But, if she claims a tenancy, she can claim only by succession; the tenancy to which Phelps was entitled and to which the defendant claimed, on his death, to succeed, had certain incidents attached to it by the order of the court; and the defendant cannot, in my judgment, claim the benefit of the tenancy and at the same time disclaim the incidents. These incidents are that, in addition to and as distinct from the standard rent, the specified weekly sums have to be paid until they have been fully discharged; and, on the defendant defaulting in these payments, it may be (I say no more) that the plaintiff could obtain an order for possession in proceedings brought against her for that purpose.

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[20] [1951] 1 K.B. 400.

It may be said (and has in fact been said) that from and after the making of the order the tenancy was not a statutory tenancy because the tenant did not thenceforward retain possession of the premises by virtue of the provisions of the Act—see section 15 of the 1920 Act—but partly by virtue of these provisions, and partly under the provisions of the order of the court. It is, of course, true, as I have just said, that certain though temporary incidents have been incorporated into the tenancy, but Phelps continued, in my opinion, to be a statutory tenant after the order was made. Section 15 is not exhaustive, and Phelps did not cease to be a tenant by virtue of the provisions of the Act merely because he had to comply for the time being with certain further requirements. I agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Denton, Hall & Burgin for Charles G. Lester and Russell, Bournemouth; Peacock & Goddard for Buchanan & Llewellyn, Bournemouth.*

B. A. B.

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## LAMB *v.* JEFFRIES.

1956
*Jan.* 18.

Lord Goddard C.J., Stable and Ashworth JJ.

*Local Government — Local authority — Member of — Disqualification — Paid office "in the gift or disposal" of local authority — Assistant master of county secondary school member of local council —Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 59 (1) (*a*).

Pursuant to a scheme of divisional administration made by a town council as divisional executive, an instrument and articles of government were drawn up relating to county secondary schools. Both under the scheme and the articles of government it was provided that the appointment of assistant masters to those schools should be made by the governors in consultation with the head master, but that any appointment should be subject to confirmation of the divisional executive. L. was appointed an assistant master to a county secondary school in the borough and also acted as a member of the town council. On a charge under section 84 of the Local Government Act, 1933, for acting as a member of the council while disqualified under section 59 (1) (*a*) of the Act,[1] L. was convicted:—

*Held* (Stable J. dissenting), that since the post of assistant master was not effective until it was confirmed by the town council, it was a paid office "in the . . . disposal" of the local authority within section 59 (1) (*a*) and, accordingly, L. was disqualified for acting as a member of the council and was rightly convicted.

CASE STATED by the Lowestoft justices.

On June 23, 1955 an information was preferred by the prosecutor against the defendant, Raymond William Lamb, that on or about June 8, 1955, at Lowestoft he acted as a member of the Lowestoft Town Council, he being at that time disqualified for so acting contrary to section 84 of the Local Government Act, 1933.

On July 7, 1955, the justices heard the information and found the following facts: The borough of Lowestoft was a borough excepted under paragraph 4 of Part III of the First Schedule to the Education Act, 1944, from the scheme of divisional administration made by the East Suffolk County Council as the local education authority, and the Lowestoft Town Council had made a scheme of divisional administration, called the Borough of Lowestoft Scheme of Divisional Administration, 1945, which was duly approved by the Minister of Education and came into force on December 6, 1945. Pursuant to that scheme the county council had made an instrument and articles of government for county secondary schools relating to county secondary schools within the borough. The defendant was on June 8, 1955, an assistant master at the Lowestoft Secondary Grammar School, a county secondary school within the borough, having been appointed under paragraph 7 of the articles of government. The post of assistant master was a paid office or other place of profit for the purposes of section 59 (1) (*a*) of the Local Government Act, 1933.[1] The defendant acted as a member of the town council on June 8, 1955.

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[1] Local Government Act, 1933, s. 59 (1): "Subject to the provisions "of this section, a person shall be "disqualified for being elected or "being a member of a local authority "if he—(*a*) holds any paid office or "other place of profit . . . in the gift "or disposal of the local authority or "of any committee thereof."

It was contended by the defendant that he was the servant of the county council and that on the proper construction of the scheme of divisional administration and of the instrument and articles of government the post of assistant master at the Lowestoft Grammar School was not a paid office or other place of profit in the gift or disposal of the town council or of any sub-committee of the town council. On behalf of the prosecutor it was contended that the defendant was disqualified for acting as a member of the town council by virtue of sections 84 and 59 (1) (*a*) of the Act of 1933, having regard to the scheme and instrument and articles.

The justices were of opinion that the requirement in paragraph 7 (*b*) of the articles of government for confirmation by the town council, as divisional executive, of appointments of assistant masters made by the governors, taken in conjunction with the requirement in paragraph 21 (3) (*a*) of the scheme of divisional administration that two-thirds of the governors should be appointed by the town council, resulted in such appointments being in the gift or disposal of the town council or of a committee of the council. Accordingly, they convicted the defendant and fined him £5 and £10 10s. costs.

The defendant appealed.

*Michael C. Parker* for the defendant. The appointment of an assistant master is not in the gift or disposal of the town council within section 59 (1) (*a*) of the Act of 1933. Under the scheme of divisional administration the council cannot choose the master; they only have power to confirm the appointment once it is made by the governors in consultation with the head master.

[STABLE J. No master as a member of the town council can increase his emoluments.]

No, the town council has no power to regulate the conditions of service of masters. The position is that the governors, having decided, in consultation with the head master, to appoint an assistant master, the town council decides whether to confirm the appointment or not.

[LORD GODDARD C.J. The office may not be "in the gift" of the town council, but is it not at their disposal?]

The town council cannot dispose of the office because they have nothing to do with the selection; they can only say "No."

[LORD GODDARD C.J. If they have the right of veto, they have the right of consent.]

The office is only in the gift of the governing body. The town council can only confirm or veto the appointment. The section should be interpreted strictly. The mischief against which the section aims is anyone being in the position to affect his emoluments. The fact of a person being a member of the town council cannot affect his position as assistant master. In *Crump* v. *Lewis*,[2] a case concerned with section 46 of the Local Government Act, 1894, Lord Alverstone C.J. said[3]: "The intention "of section 46 (*d*) of the Local Government Act, 1894, was to "prevent the mischief of paid officers acting and voting as members of the body which pays them." The mischief aimed at is the same in the present case as in that case. It is true that the town council consent to the appointment, but by then the office has been disposed of by the governing body.

[Ashworth J. The appointment will not take effect until the town council have said "Yes."]

But it is not in a position to say "Yes" until the other persons have made a decision. The disposal of the office covers not only appointment, but also dismissal, and the town council has nothing to do with dismissal.

*Geoffrey Rippon* for the prosecutor. If one looks at section 10 (2) of the Education Act, 1946, it will be seen that Parliament does give some relief to teachers. That section refers to section 59 (2) of the Act of 1933, but there is no reference to section 59 (1) (*a*).

[Ashworth J. Does section 10 (2) allow a teacher to be a member of the county council?]

No, he is prevented from so being by section 59 (2). There is a difference in being a member of a local authority which is the education authority and one which is not. Section 10 (2) enables teachers employed by a local education authority to be a member of a district council notwithstanding the fact that that district council appoints members onto the committees or sub-committees of the local education authority.

If the office was not in the gift or disposal of the town council it was a joint appointment by the governors and the town council. [*Greville-Smith* v. *Tomlin*[4] was referred to.]

The payment of salary is not conclusive. The question is whether a master is under the control of the town council: see *Rex* v. *Davies, ex parte Penn.*[5] In the present case the defendant is caught by section 59 (2) in any event, but he is also caught by section 59 (1) (*a*) because he is holding office on the appointment of the divisional executive, which is the town council.

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[2] [1908] 1 K.B. 858; 24 T.L.R. 321.

[3] [1908] 1 K.B. 858, 863.

[4] [1911] 2 K.B. 9.

[5] (1932) 48 T.L.R. 666; 148 L.T. 19.

[STABLE J. If a test in the *Davies* case[5] is right it puts you out of court because a town council has no control over the defendant.]

The council has all the ultimate control required. This is clear from the scheme of divisional administration.

*Parker* in reply. Neither of the two cases cited for the prosecutor help him; the circumstances were quite different from those in the present case.

[LORD GODDARD C.J. It is a pity that the defendant did not take action under section 84 (3). It is obviously a case of very great importance.]

The reason he did not do so was that it was thought that it might save expense.

LORD GODDARD C.J. This is a case stated by justices for the Borough of Lowestoft, before whom an information was preferred by the prosecutor against the defendant for that on June 8, 1955, "he acted as a member of the Lowestoft Town Council, he being "at that time disqualified for so acting contrary to section 84 "of the Local Government Act, 1933."

Section 84 of the Act of 1933 deals with proceedings in respect of qualification or disqualification, and it provides that these matters can be dealt with in a court of summary jurisdiction or by means of actions in the High Court.

The only ground on which I am differing from the justices is that I regret that they thought it necessary to impose a fine of £5 in addition to costs in a case in which it is quite obvious that the defendant had no intention of breaking or evading the law or acting otherwise than in good faith. The case is one of considerable difficulty and raises the question whether the defendant offended against section 59 (1) of the Local Government Act, 1933. I should have thought that it would have been quite sufficient if the justices, having decided against him, had imposed a nominal penalty merely to mark the fact that they thought a breach had been committed.

The circumstances, so far as I need go into them in detail before considering the main question in the case, are these: The Borough of Lowestoft is what is called for the purposes of the Education Act, 1944, an excepted district, and in an excepted district education in the borough is not, as I understand it, directly administered by the county council, who are the education authority. In consequence of the borough being an excepted district there was a scheme of divisional administration prepared, which was approved by the Minister of Education, which is a long and, to some extent, difficult document to follow, but it creates the borough council as, what is called, a divisional executive. The county council drew up an instrument and articles of government for county secondary schools. The articles of government deal with the appointment of head masters and assistant masters, and both in the scheme of divisional administration and in the articles of government there are provisions for the divisional executive approving the appointment of assistant masters. In the scheme of divisional administration, paragraph 18, it is provided: "In the case of the appointment "of assistant masters and assistant mistresses in county controlled and special agreement secondary schools, appointments "shall be made within the financial limits of the approved "estimates by the governors of the said schools in consultation "with the head master or head mistress as the case may be. "Any appointment so made shall be subject to confirmation by "the divisional executive. The procedure in relation to the "notification of vacancies, transfers of staff and advertisements "shall follow the procedure prescribed by paragraph 17 (1) hereof "with the substitution of the term 'governors' for the term "'managers.'"

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[5] (1932) 48 T.L.R. 666.

When one turns to the articles of government one finds very much the same provision in paragraph 7, which provides: "(*a*) On the occurrence of a vacancy for an assistant master, "the governors shall notify the [Lowestoft Education Committee], who shall, if they think fit, advertise the post. "(*b*) Assistant masters shall be appointed to the service of the "local education authority by the governors in consultation with "the head master within the limits of the establishment of staff "laid down for the current year by the committee and such "appointments shall be subject to confirmation by the divisional "executive."

I am not going into the difficult question here about who appoints the governors and how they are appointed, or by whom the different bodies are appointed; they seem to me to be somewhat confusing and somewhat contradictory, but at any rate it is clear both from the scheme of divisional administration and from the articles of government that an assistant master is chosen in the first place by the governors in consultation with the head master, but his appointment is not effective until confirmed by the divisional executive, which is the town council.

Section 59 of the Local Government Act, 1933, which is made penal by section 84 (1), provides: " (1) Subject to the provisions " of this section, a person shall be disqualified for being elected " or being a member of a local authority if he—(*a*) holds any " paid office or other place of profit (other than that of mayor, " chairman or sheriff) in the gift or disposal of the local authority " or of any committee thereof." Whether it was considered that the section should reach out so far as to affect the schoolmaster who is appointed in consequence of these various and very elaborate provisions which depend upon an education Act passed 11 years after the Local Government Act, may be at least open to question. But we have simply to construe these words: Is this appointment of an assistant master at this school " in " the gift or disposal " of the local authority? First, as the words are " gift or disposal," it would seem that the intention of Parliament was to make them wide and to include something more than can be described as a gift. If an appointment is to be made of an assistant master, the governors first have to consult the head master and, after consultation with him, they have to decide to whom the post should be offered, but that will not be effective. The person who is chosen by the governors after consultation with the head master will not be able to exercise the office of a teacher in a school unless the appointment has been confirmed by the local authority. Therefore, it seems to me that the local authority can either assent or dissent to the appointment and, for that reason, the office is at their disposal because until they have confirmed it the appointment is not a valid appointment.

I have come to this conclusion after considerable hesitation and with some regret, but my duty is simply to construe the words of this statute. I regret particularly that this matter has been brought in the form in which it has because a point of this sort is of great importance to assistant masters and, as I say, there is no suggestion so far as I know here of any bad faith or intention to evade an Act of Parliament. It would have been much better if it could have been fought out in the High Court. Of course, an action may still be brought in another case because although our decision today might be binding on a judge of first instance, it would not be binding on the Court of Appeal. One disadvantage of it being tested in this way is that this case is not open to appeal but, as it has been, I can only say that the justices came to a right decision in point of law.

STABLE J. I agree that this case raises a question of great difficulty and of very considerable public importance. After much hesitation, and though it will not affect the result of this case, but may be some small encouragement to teachers to pursue a different course, I have come to the conclusion that the defendant was not disqualified from election to the post of borough councillor. The Act we have to construe provides that subject to certain provisions a person shall be disqualified for being elected or being a member of the local authority if he holds any paid office or other place of profit in the gift or disposal of the local authority or any committee thereof. At the time when the defendant was elected to the Lowestoft Borough Council he was an assistant master in the excepted district, where education is carried on under the machinery of a scheme of divisional administration. The terms of the contract under which the defendant occupied the post of assistant master were determined, not by the Lowestoft Council, but by the county council. The money was provided by the county council and they alone were the body who had the power to determine what his emoluments were to be. So far as the appointment was concerned, the provisions of the scheme can shortly be stated as follows: The governors were to appoint on a vacancy, that is to say, it was their business to nominate after consultation with the head master, and after they had made their nomination it went up to the borough council. The only control that the borough council had over the matter was to refuse to put forward the nominee of the governors, and that is all. So far as dismissal is concerned, a perusal of clause 19 (1) of the scheme shows that their powers were purely advisory. In those circumstances, the question we have to consider is: Was this an office in the gift or disposal of the Lowestoft Borough Council? In my view, it was not. It certainly was not in their gift, and the mere fact that they had a right of veto and virtually nothing else would not, in my view, make that an office of which they had the disposal.

I should like to associate myself with what my Lord has said in regard to the penalty. It completely passes my understanding why a perfectly bona fide mistake in a matter of great difficulty should have called for a fine of £5. It appears to me to be a matter of considerable public importance because the effect of this decision is that a large number of schoolmasters—and as education becomes more and more nationalized the number will be increased—will be debarred from taking part in many branches of local government. I observe that under clause 3 (2) (*b*) of the scheme it provides: " So far as may be reasonably practicable " the persons appointed as members of the committee shall be " persons having experience in education or knowledge of the " educational requirement of the excepted district." In my opinion, the justices came to a wrong decision and I should allow the appeal.

ASHWORTH J. I agree fully with the judgment delivered by my Lord, the Chief Justice, and I cannot usefully add anything to it.

*Appeal dismissed.*

Solicitors: *K. Wormald; Butt & Bowyer for Daynes, Keefe & Co., Norwich.*

J. D. P.

## MOYNES *v.* COOPPER.

1956
*Jan.* 27;
*Feb.* 3.

Lord Goddard C.J.,
Hilbery and Stable JJ.

*Criminal Law—Larceny—" Takes "—Under mistake—Money paid in mistake of fact—Overpayment in wages packet—Employee intended by wages clerk to receive whole contents of packet—At time of taking packet no knowledge by employee that contents more than due—Subsequent discovery by employee of overpayment—Intent to appropriate overpayment—Larceny Act,* 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 1 (2) (i).

A wages clerk, by mistake, put £6 19s. 6½d. more money than was in fact due to an employee into a pay packet which he handed to the employee, thinking that the whole amount was due to him and intending that the employee should receive the whole of the contents. At the time when he received the pay packet the employee did not know that it contained more than was due to him, and he first discovered what it contained when he opened it later the same day at his home. When he opened the packet the employee knew that he had been overpaid £6 19s. 6½d. by mistake and dishonestly decided to, and did, appropriate to his own use the whole of the contents of the packet. The employee was charged with stealing £6 19s. 6½d., the property of his employers, contrary to section 2 of the Larceny Act, 1916:—

*Held* (Stable J. dissenting), that the definition of " takes " in section 1 (2) (i) (*c*) of the Larceny Act, 1916, affirmed the common law that to constitute the offence of larceny the taker must have animus furandi at the time when he took the property and that, since at the time when he took the packet the employee did not know of the mistake on the part of the wages clerk, the taking was not animo furandi and, therefore, was not a taking within the section. Accordingly, although the employee had been guilty of grave dishonesty, he was not guilty of larceny or of any criminal offence.

*Reg.* v. *Prince* (1868) L.R. 1 C.C.R. 150 and *Reg.* v. *Middleton* (1873) L.R. 2 C.C.R. 38 considered.

*Rex* v. *Hudson* [1943] K.B. 458; 59 T.L.R. 250; [1943] 1 All E.R. 642 distinguished.

Case stated by West Kent Appeal Committee.

The defendant, George William Moynes, was charged before Kent justices sitting at Malling with on May 2, 1955, stealing the sum of £6 19s. 6½d. in money, the money of his employers, contrary to section 2 of the Larceny Act, 1916. The justices convicted the defendant and fined him £10, and the defendant appealed to quarter sessions.

The following facts were found by the appeal committee. On April 7, 1955, the defendant, a labourer, was engaged by a firm of contractors to work at a Royal Air Force station. On April 29, 1955, the defendant requested the site agent of his employers to pay him an advance in pay; on the same day the site agent paid him £6 19s. 6½d., being part of the wages earned and due to the defendant, for which sum the defendant signed a receipt. In consequence of the advance there remained due and owing to the defendant the sum of 3s. 9½d., being £7 3s. 4d., the total of wages earned and due to the defendant less the £6 19s. 6½d. advanced. On April 29 the employers' wages clerk put £7 3s. 4d. into a wages packet in order that he might hand it in that packet to the defendant and placed the packet in a safe for the weekend. On May 2, 1955, the wages clerk, acting for and on behalf of the employers, without (i) any notice or knowledge of the advance of £6 19s. 6½d.; (ii) any representation made to him by the defendant; or (iii) any mistake as to the identity of the defendant, handed over to the defendant the wages packet containing the £7 3s. 4d. The wages clerk, as duly authorized agent of the employers, parted with the sum of £7 3s. 4d. under the mistaken belief that that sum was then due and owing to the defendant. The defendant did not know that the wages packet contained the sum of £7 3s. 4d. at the time that he received the packet and he first discovered that it contained that sum when he opened it later the same day at his home. When he opened the packet he knew that he had been paid in fact £6 19s. 6½d. twice by mistake, and with that knowledge he dishonestly decided to appropriate to his own use and did appropriate dishonestly the whole of the second payment, including the sum of £6 19s. 6½d.

It was contended by the prosecutor that on those facts the defendant's dishonest appropriation of the second payment of £6 19s. 6½d. amounted to larceny as defined by section 1 of the Larceny Act, 1916, in that the defendant, without the consent of the owner, took the sum under a mistake on the part of the owner with knowledge on his part that possession had been so obtained.

It was contended by the defendant that the sum of £6 19s. 6½d. was paid to him with the consent of the owner and that accordingly the appropriation could not amount to larceny.

The appeal committee were of the opinion (*a*) that *Reg.* v. *Prince* [1] (where it was held that there was no larceny) was indistinguishable except that Prince contributed to the mistake by his own act; (*b*) that an analysis of the judgments in *Reg.* v. *Middleton* [2] indicated that the decision therein (that there was a larceny) was distinguishable in that the wages clerk had authority to pass the property in the wages packet and its contents; he intended to pass the property therein to the defendant and he handed the packet to the defendant without making any mistake as to the identity of the packet or its contents or of the recipient; (*c*) that the words "without the "consent of the owner" dominated and governed the whole definition of larceny in section 1 (1) of the codifying Larceny Act, 1916; the special meaning given by subsection (2) to the word "takes" did not dispense with the necessity of a larceny (as opposed to the offence created by section 32) being an obtaining without the consent of the owner; and (*d*) that the defendant committed no trespass and was not guilty of the offence of larceny by stealing. Accordingly, they allowed the defendant's appeal and quashed the conviction.

The prosecutor appealed.

*Edward Gardner* for the prosecutor. The wording of the Larceny Act, 1916, is important: section 1 (2) (i) (*c*) defines "takes" as including the obtaining of possession under a mistake on the part of the owner with knowledge of that mistake on the part of the taker. Where, therefore, property is handed over

[1] (1868) L.R. 1 C.C.R. 150.

[2] (1873) L.R. 2 C.C.R. 38.

under a mistake and the receiver knowing of the mistake fraudulently misappropriates it, he is guilty of larceny.

[Lord Goddard C.J. referred to *Reg.* v. *Prince*.[3]]

*Reg.* v. *Prince* [3] is distinguishable from this case because there the consent of the owner was induced by fraud; it is the state of mind of the owner that is important. It is submitted that in this case there was no consent by the owner, and reliance is placed on *Rex* v. *Hudson* [4] where, as here, there was a fundamental mistake on the owner's part. In this case the wages clerk, the servant of the owner, only parted with possession of the money, not with the property in it. [Reference was also made to *Reg.* v. *Middleton* [5] and *Reg.* v. *Ashwell*.[6]]

[Lord Goddard C.J. I do not think that any court has ever said that it would or would not follow *Reg.* v. *Ashwell* [6] because the court in that case was equally divided.]

In *Reg.* v. *Middleton* [7] Bovill C.J., reading the judgment of Cockburn C.J., Blackburn, Mellor, Lush, Grove, Denman and Archibald JJ., said [8]: "In the present case the finding of the "jury, that the prisoner, at the moment of taking the money, "had the animus furandi and was aware of the mistake, puts an "end to all objection arising from the fact that the clerk meant "to part with the possession of the money," and [9] ". . . there "was no intention to give it to him or to any one. It was simply "a handing over by a pure mistake, and no property passed." At the moment of forming the intention to misappropriate, the defendant ceased to take the money with the consent of the owner, and his position was the same as that of the defendant in *Reg.* v. *Middleton*,[10] who took the money with the consent of the Post Office clerk. Section 1 (2) (i) (*c*) of the Larceny Act, 1916, confirms the holding in *Middleton's* case.[10]

[Lord Goddard C.J. If the taking was without felonious intent it was not turned into larceny by a subsequent felonious intent unless the original taking was wrongful, even if only a civil wrong: *Reg.* v. *Riley*.[11]]

The defendant was not entitled to the money in the first place; his possession, therefore, was wrongful from the beginning and the element of trespass persisted throughout. The taking within the meaning of the section did not occur at the time when the defendant received the pay packet but at the time when he first realized what was in the packet, and formed the dishonest intention to misappropriate it: see *Rex* v. *Hudson*,[12] approved in *Ruse* v. *Read*.[13] [Reference was also made to *Cartwright* v. *Green*[14] and *Merry* v. *Green*.[15]] If the defendant is not guilty of larceny, there is no other offence with which he can be charged.

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[3] L.R. 1 C.C.R. 150.

[4] [1943] K.B. 458; 59 T.L.R. 250; [1943] 1 All E.R. 642.

[5] L.R. 2 C.C.R. 38.

[6] (1885) 16 Q.B.D. 190; 2 T.L.R. 151.

[7] L.R. 2 C.C.R. 38.

[8] Ibid. 43.

[9] Ibid. 44.

[10] L.R. 2 C.C.R. 38.

[11] (1853) Dears.C.C. 149; 6 Cox C.C. 898.

The defendant did not appear and was not represented.

*Cur. adv. vult.*

Feb. 3. LORD GODDARD C.J. The judgment I am about to read is that of HILBERY J. and myself.

This is a special case stated, with admirable brevity and clarity, by the appeal committee of the West Kent Quarter Sessions, who allowed an appeal by the defendant against his conviction by a magistrates' court for the larceny of money the property of his employers.

The facts found by the committee are that on April 29, 1955, the defendant, who was a workman on a military site, asked his employers' representative on the site for an advance of wages which would become due to him on May 2. This request was granted and he was paid £6 19s. 6½d. on account. The full amount which would have been due to him on May 2 was £7 3s. 4d., so all that he ought to have received on that day was 3s. 9½d. On April 29 the wages clerk made up the pay packets and either in ignorance that an advance had been made to the defendant or by forgetfulness, it matters not which, he put the full amount of £7 3s. 4d. into the defendant's packet and handed it to him on May 2. The appeal committee have found that when he received the packet the defendant did not know that it contained this sum, and we must assume from their finding that the defendant did not know that his packet contained more than was due to him. He opened the packet later in the day and then for the first time discovered the amount it contained. He then dishonestly decided to appropriate the contents and did so, so that he kept for his own use £6 19s. 6½d. more than that to which he was entitled. The question is whether that amounts in law to larceny.

The problem as to dishonest appropriation in cases where money has been paid under a mistake has been the subject of many cases and much difference of judicial opinion. The appeal committee were of opinion that this case was indistinguishable from *Reg.* v. *Prince*,[1] decided in 1868. In that case the cashier of a bank, who had authority to pay cheques, was deceived by the presentation of a forged cheque by the prisoner. He paid the amount of the cheque and the prisoner was indicted for stealing the proceeds. It was held that this did not amount to larceny. Blackburn J., lamenting, as we also may, that this was the law, said[2]: "If the owner intended the property to pass, "though he would not so have intended had he known the real "facts, that is sufficient to prevent the offence of obtaining "another's property from amounting to larceny." It was held in that case that the prisoner's offence amounted to obtaining the money by a false pretence, but in the present case no question of false pretences arises as the defendant made no representation of any sort.

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[12] [1943] K.B. 458.

[13] [1949] 1 K.B. 377; 65 T.L.R. 124; [1949] 1 All E.R. 398.

[14] (1803) 8 Ves. 405.

[15] (1841) 7 M. & W. 623.

The next case which bears on the subject is *Reg.* v. *Middleton*,[3] and in 1885 there came the much discussed case of *Reg.* v. *Ashwell*,[4] in which unfortunately the court was equally divided. We do not propose to discuss these or any subsequent cases on the subject in detail because in our opinion the matter is now concluded by section 1 (2) of the Larceny Act, 1916. It will be remembered that there have been in the last 90 years two codifications of the law of larceny. The first was the Larceny Act of 1861, the long title of which is: "An Act to consolidate and "amend the statute law of England and Ireland relating to "larceny and other similar offences." While that Act in section 1 defined a considerable number of terms, such as "document of title to goods" and "valuable security" among others, it did not contain a definition of larceny or any of the necessary constituents of that crime. The Larceny Act of 1916, which is now the governing statute, is entitled: "An Act to "consolidate and simplify the law relating to larceny triable "on indictment and kindred offences," and does contain an elaborate definition of larceny. This Act was not intended to alter the law and, as has often been said, it has not done so; but while the Act of 1861 consolidated, and to some extent amended, the statute law, the later Act consolidates and simplifies the whole law, which includes the common law as expounded by judicial decision. What amounts to a "taking" sufficient to amount to larceny was much discussed in *Reg.* v. *Middleton*,[5] and in our opinion it is the effect of that decision which is reproduced and enacted as the law. Section 1 (2) (i) of the Act of 1916 provides: "the expression 'takes' includes obtaining the "possession . . . (*c*) under a mistake on the part of the owner "with knowledge on the part of the taker that possession has "been so obtained." This, in our opinion, is affirming the common law that the taker must have animus furandi at the time when he takes the property. In *Middleton's* case[5] the wrong amount of money was paid by the post office clerk before the prisoner, who picked it up knowing of the clerk's mistake and so took it animo furandi. In the present case it is found that the defendant did not know of the mistake when he took the money, so the taking was not animo furandi. We prefer to base our decision on this ground, namely, that there was no taking here within the section. The decision in *Reg.* v. *Prince*[6] depended on the fact that the bank, acting through its authorized clerk, did intend to pass the property in the money though it was induced to do so not by its own or his mistake but by fraud. Where a transfer of property is obtained by fraud, there is no doubt but that the property does pass, subject, however, to the right of the defrauded party on discovering the fraud to disaffirm the transaction and resume his property. In the present case the action would be for money had and received to the company's use as paid under a mistake of fact.

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[1] (1868) L.R. 1 C.C.R. 150.

[2] Ibid. 155.

[3] (1873) L.R. 2 C.C.R. 38.

[4] (1885) 16 Q.B.D. 190; 2 T.L.R. 151.

For these reasons, while the defendant was guilty of grave dishonesty, in our opinion he was not guilty of larceny, and in the present state of the law he was not guilty of any criminal offence.

Before parting with the case, we ought to refer to *Rex* v. *Hudson*,[7] ~~on~~ which the prosecution placed reliance. That case has been the subject of a good deal of criticism, see, for instance, Russell on Crime, 10th ed. (1950), Vol. 2, pages 1158–1161, as to whether the charge ought not to have been for obtaining an altered cheque by false pretences; the appellant had certainly been guilty of some crime. He was charged with stealing a cheque which had come to him by post and was intended for another person of the same surname, but there was no initial either on the envelope or cheque. The accused, knowing that the cheque was not intended for him, got the drawer to insert his initial on the cheque, which he kept and cashed. This would seem to be closely akin to stealing by finding, as when he found the cheque in the envelope he could easily have discovered the true owner. But in our opinion it is not an authority for the present case, as in *Hudson's* case [7] neither the cheque nor the envelope was intended by the sender for the accused. Here there is no doubt that the pay packet was intended for the defendant and was so delivered to him.

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[5] L.R. 2 C.C.R. 38.

[6] L.R. 1 C.C.R. 150.

[7] [1943] K.B. 458; 59 T.L.R. 250; [1943] 1 All E.R. 642.

The appeal is dismissed.

Stable J. On June 13, 1955, the defendant was convicted by the magistrates' court sitting at West Malling for having on May 2, 1955, stolen £6 19s. 6½d. the property of a limited company, M. J. Gleeson (Contractors) Ltd., by which he was employed. He appealed against this conviction to the West Kent Appeal Committee, who heard the appeal on August 5, 1955, and quashed the conviction.

The facts, which are fully and clearly set out in the case stated to this court, may be summarized as follows: At the material time the defendant was employed by Gleeson's at a net wage of £7 3s. 4d. On April 29 the defendant, in response to his application to Gleeson's agent on the site where he, the defendant, was working, received the sum of £6 19s. 6½d. as an advance on his week's wages. On the same day Gleeson's wages clerk in the performance of his duty put £7 3s. 4d. into a wages packet to be handed to the defendant on pay day. Whether this was done before or after the defendant had received his advance we do not know, nor does it matter, as the pay clerk was not aware of this advance payment and put the money into the envelope in the belief that the defendant would be entitled to be paid his full wage when pay day came.

On May 2, 1955, the wages clerk, still thinking that the full amount of the week's wages was due and payable to the defendant, handed the pay packet to him, who took it honestly believing that it only contained the sum of 3s. 9½d., which was the amount of his weekly wage then outstanding. From this it is clear that the actual handing over and receipt of the pay packet was the result, not of a mutual mistake, but of two separate mistakes. There are few words in the English language susceptible to more meanings and subject to not infrequent misuse than the word "mistake." To take but three examples, which are far from being exhaustive: A. shoots at a pigeon and kills a crow "by mistake": A. shoots at a crow believing it to be a pigeon and kills it "by mistake": A. not intending to fire his

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[7] [1943] K.B. 458.

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gun, lets the gun off "by mistake." In the first case the mistake was simply a bad shot, in the second a failure to distinguish a crow from a pigeon, and in the third case gross carelessness.

In the present case the "mistake" was twofold: in the case of the wages clerk it consisted of, or arose from, his ignorance that the defendant had received a substantial advance on account of his wages: in the case of the defendant his erroneous belief that the packet contained the sum to which he was entitled, namely, 3s. 9½d. and no more.

To return to the facts, the defendant, on arriving home with his pay packet on the same day that he received it, opened it and then discovered for the first time that it contained a sum of £6 19s. 6½d. in excess of what he was entitled to, whereupon he dishonestly decided to, and did, misappropriate that sum to his own use. It was for this that he was convicted of larceny.

The grounds upon which it was contended on behalf of the defendant before the appeal committee that he could not be convicted of larceny were two, namely, (1) that, the pay packet having been handed over to him by the employer or his duly authorized agent intending to pass the possession and property in its contents to him, the owner consented to his having it, therefore, no subsequent misuse of the money by him could in law be larceny, and (2) that to constitute the offence of larceny the taking and the animus furandi, the dishonest intent, must be contemporaneous. These two grounds are, in my judgment, wholly separate and distinct and are considered separately.

As regards the first of the two grounds, the appeal committee held that they were bound by *Reg.* v. *Prince*.[8] The facts of that case were very different from those now under consideration, but there can be no doubt that if in the present case the defendant had obtained his pay packet by falsely and fraudulently telling the wages clerk that he had not received any advance on account of wages, but was entitled to be paid the full amount, that case is a clear authority that he should have been indicted for false pretences, and if indicted for larceny could not properly have been convicted. In the light of the later authorities to which I am about to refer *Reg.* v. *Prince*,[9] though it goes a long way in the defendant's favour, is not in my judgment decisive of the present case.

The decision which, in my opinion, disposes of the first point is *Reg.* v. *Middleton*,[10] where *Reg.* v. *Prince*[11] was among the authorities considered. The facts were shortly as follows: The accused applied at a Post Office for payment of a sum of 10s. to which he was entitled. The clerk in error referred to the wrong advice note which authorized a payment of £8 16s. 10d. to someone else, placed that sum on the counter for the accused who, knowing that he was not entitled to it, dishonestly picked it up and went off with it. The court, by a majority of 11 to four, held that he was properly convicted of larceny. A close perusal of the judgments shows that even where two or more of the judges reached the same conclusion, their process of reasoning and the grounds on which their conclusions were based were not invariably identical. The distinction between that case and the present, namely, that in *Middleton's* case [12] the animus furandi was contemporaneous with the handing over the money, is for the point now under immediate consideration in my judgment immaterial. The relevance of the authority to the present case is the decision that in certain circumstances consent given in error and under a misapprehension of the true facts is not a consent of the true owner. It seems that the decision of the majority of the court was partly based on the fact that the Post Office servant was not the owner of the money and only had a qualified authority to dispose of it, but the wages clerk in the present case was, in my judgment, in an identical situation; he was not the owner of the money and his only authority was to pay over the correct amount of wages, no more and no less. In this context I would refer to the dissenting judgment of Brett J.,[13] where he clearly indicates his view that the decision did not turn on the fact that the money was handed over by a clerk and not by the Postmaster-General in person. In my judgment, the decision in *Middleton's* case [13] disposes of the contention that the employers consented to the present transaction.

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[8] L.R. 1 C.C.R. 150.

[9] Ibid.

[10] L.R. 2 C.C.R. 38.

[11] L.R. 1 C.C.R. 150.

Turning to the second ground, in my judgment the decision of the appeal committee was erroneous for two reasons, namely, that on the facts proved the animus furandi was contemporaneous with the taking and, secondly, even if it was not, having regard to the fact that when he received the pay packet the defendant did not know that the packet contained the sum of money to which he had no legal or equitable right, the time lag between his first getting possession of the pay packet and the animus furandi is immaterial. Inevitably in human affairs events occur in a time sequence, and even if the defendant had opened his pay packet in the hut or office, or wherever it was that he received payment, some time must have elapsed between the actual possession of the packet and his discovery of its contents. Since, when he got home on the same day immediately on opening the packet he formed the felonious intent, in my judgment the whole sequence should be regarded as one transaction and the taking and the animus furandi contemporaneous, see *Reg.* v. *Ashwell*,[14] *per* Stephen J.[15] where he says: "If a man finds a purse, picks "it up, opens it, finds money in it, and thereupon determines "to keep it for himself, it appears to me that the whole process "ought to be regarded as one action, taking place at one time, "as for many purposes the fractional parts of a day are not "regarded by the law." This passage was referred to and approved in *Rex* v. *Hudson*.[16] Applying that passage to the present case, at the moment when the defendant discovered that this pay packet contained a sum of money to which he knew he had no right, he misappropriated it and was consequently, in my judgment, then and there guilty of larceny. If the defendant immediately on being handed the envelope had opened it and, on discovering that it contained money he was not entitled to, had decided to misappropriate it, on the authority of *Reg.* v. *Middleton*[17] he would have been guilty of larceny, and I cannot see that the fact that he postponed opening the envelope till he got home—a perfectly normal course to pursue—can affect the legal position. Assuming, however, that that view is wrong and that the whole process ought not to be regarded as one action taking place at one time, the question still remains whether the taking of the money was complete when the envelope containing it was handed to the defendant or whether the real taking was when on opening the envelope he discovered for the first time what it really contained.

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[12] L.R. 2 C.C.R. 38.

[13] Ibid. 64, 65.

In *Reg.* v. *Riley*[18] a farmer inadvertently and innocently drove off a lamb that did not belong to him in a flock of 29 of his own lambs. When he came to sell his lambs he discovered for the first time the presence of the stranger in the flock and dishonestly sold it as his own. He was convicted at quarter sessions of larceny of the one lamb, and the conviction was upheld by a court consisting of Pollock C.B., Parke B. and Williams, Talfourd and Crompton JJ. Pollock C.B. decided the case on the grounds that either until the discovery of the

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[14] 16 Q.B.D. 190.

[15] Ibid. 216.

[16] [1943] K.B. 458, 461.

[17] L.R. 2 C.C.R. 38.

[18] (1853) Dears.C.C. 149; 6 Cox C.C. 88.

"stranger" there was no taking, or if there was an antecedent taking it was, though inadvertent, unlawful. Parke B. rested his judgment on the second ground only, namely, that the original taking was a trespass. In my judgment, this case is a strong authority in favour of the prosecutor. Both in the case of the flock of sheep and the pay envelope the accused man honestly took away something which he did not know was there, and therefore in relation to which he was then incapable of forming an intention honest or otherwise. Whatever the appropriate form of action might be, the accused in the case of the lamb had no legal right to it. In the present case, in the light of the true facts, which is the light in which legal rights are ascertained, neither had the defendant any right to the money which he misappropriated.

In his judgment in *Reg.* v. *Ashwell*[19] Lord Coleridge C.J. said[20]: "In good sense it seems to me he did not take it till he "knew what he had got; and when he knew what he had got, that "same instant he stole it." That passage is cited with approval in the judgment of the court in *Rex* v. *Hudson*,[21] where this passage appears[21]: "That is what the appellant did in this case. "As soon as he saw what he had got, he made up his mind to "steal it." Lord Coleridge C.J. discusses *Reg.* v. *Riley*[22] in his judgment in *Reg.* v. *Ashwell*,[23] where he expresses the view that the result would have been the same if the owner of the lamb had been present when it was driven off. The point may be stated in another form, namely, that as the taking is a necessary ingredient in the crime of larceny and is governed by the word "fraudulently", that must connote that there cannot be a taking within the section unless the taker knows what he is taking or at least whether what he is taking belongs to him or not. Put more shortly, the taking must be an act of the mind as well as of the hand.

*Reg.* v. *Riley*[24] does not touch on the first point raised by the defendant on the subject of consent as on the facts that question did not arise. *Ruse* v. *Read*,[25] a case where the original taking though not felonious was a trespass, reaffirmed the validity of the decision in *Riley's case*,[26] but it is also to be observed that the decision in *Rex* v. *Hudson*[27] was referred to[28] with approval.

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[19] 16 Q.B.D. 190.

[20] Ibid. 225.

[21] [1943] K.B. 458, 462.

[22] Dears.C.C. 149.

[23] 16 Q.B.D. 190, 226.

[24] Dears.C.C. 149.

[25] [1949] 1 K.B. 377; 65 T.L.R. 124; [1949] 1 All E.R. 398.

[26] Dears.C.C. 149.

Notwithstanding the meticulous care which the appeal committee applied to the hearing of the appeal and the preparation of this case, both on principle and in accordance with the authorities, in my judgment, for the reasons stated above, they were wrong to quash the conviction. It would seem a strange anomaly that if the wages clerk had inadvertently dropped the envelope and its contents and the defendant had chanced to find it and, on picking it up and finding what was inside, misappropriated the money he would have been guilty of larceny, but on the present facts, having been equally dishonest, gets off scot free.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co. for R. P. Tunstall, Maidstone.*

J. F. L.

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[27] [1943] K.B. 458.

[28] [1949] 1 K.B. 377, 384.

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## PRACTICE NOTE (APPEALS AND COMMITTALS TO QUARTER SESSIONS)

1956
*Feb.* 10.

**Lord Goddard C.J. and Byrne J.**

*Justices — Appeals and committals to quarter sessions — Practice — Documents to be sent to quarter sessions.*

*Reg.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller* [1956] 1 Q.B. 36; [1955] 3 All E.R. 300 explained.

Lord Goddard C.J. The Society of Chairmen and Deputy Chairmen of Quarter Sessions has called our attention to the diversity of practice which obtains among clerks to justices with regard to what should be sent by them to quarter sessions when there is an appeal from a magistrates' court and when the latter commit a prisoner for sentence under section 29 of the Criminal Justice Act, 1948, or for Borstal training under section 20. While this court has no power to give directions on the matter, as it is obviously desirable that there should be uniformity in practice, we think that we may properly express an opinion in the hope that it will be generally followed. In the case of committal for

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PRACTICE NOTE (APPEALS AND COMMITTALS TO QUARTER SESSIONS).

Lord Goddard C.J.

sentence or Borstal training it is essential that all the information that was before the committing justices should be before the appeal committee of quarter sessions, and accordingly any notes of evidence taken by the clerk and any documents put in at the hearing should be sent, as no doubt they generally are. Our opinion on this matter was, we think, made clear in the case of *Reg.* v. *Dorset Quarter Sessions, Ex parte O'Brien*,[1] heard before the Divisional Court.

As to appeals, the case of *Reg.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller*[2] has caused some difficulty. All that we meant was that it was undesirable that while trying an appeal the justices should always have the notes taken below before them unless it became necessary to see what a witness had said or what had transpired in the court below. But we had not in mind that it may often be necessary for the chairman to have access to the notes before the hearing to enable him to decide an application for legal aid, to estimate the length of an appeal when he is settling the day's list and perhaps for other matters. This had in effect been said in the *Dorset* case.[3] We hope therefore that clerks to justices will send their notes to the clerk of the peace when there is an appeal so that he can show them to the chairman or recorder if he requires them before the hearing for such purposes as those we have mentioned, and also give them to the court during the hearing if it becomes necessary or desirable for them to see what happened below.

Ormerod and Glyn-Jones JJ., who sat with me in the *Grimsby* case,[4] agree with what I have just said, as does Byrne J., who is sitting with me today.

J. F. L.

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[1] Infra.

[2] Ante, 36; [1955] 3 All E.R. 300.

[3] Infra.

[4] Ante, 36.

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1953
*Feb.* 2

Lord Goddard C.J., Lynskey and Pearson JJ.

## NOTE.

## REGINA *v.* DORSET QUARTER SESSIONS.
## *Ex parte* O'BRIEN.

APPLICATION for an order of certiorari.

On June 3, 1952, the applicant, Patricia Anne O'Brien, who had eight previous convictions, was convicted by Wareham justices of stealing £4 10s. from a taxi-driver, contrary to section 14 of the Larceny Act, 1916, and was committed to quarter sessions for sentence

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Regina v. Dorset Quarter Sessions. *Ex parte* O'Brien.

under section 29 of the Criminal Justice Act, 1948. The applicant appealed against her conviction and the appeal came on for hearing before the appeal committee on the same day as her committal for sentence. The appeal committee upheld the conviction and, on the committal, sentenced the applicant to six months' imprisonment.

The applicant applied for an order of certiorari to bring up and quash the order of the appeal committee on the grounds that during the hearing of the appeal the appeal committee had had before them documents relating to her character relevant to the question of sentence which were prejudicial to the hearing of the appeal, so that justice was not seen to be done and there had, in consequence, been a denial of natural justice.

*H. J. C. Stovin* for the applicant.
*Raymond Stock* for the respondents.

Lord Goddard C.J. Mr. Stovin moves for an order of certiorari to bring up and quash an order made by the Appeal Committee of the Quarter Sessions for the County of Dorset, who heard and dismissed an appeal by the applicant, and afterwards, she having been sent forward by justices at petty sessions for sentence, sentenced her to six months' imprisonment.

Mr. Stovin has put forward concisely everything that can be said. The applicant was convicted by the Wareham justices of stealing from the person; the facts alone would show that she must have been a woman of bad character, using that expression in the widest possible sense, and the justices, hearing that she had eight previous convictions, sent her forward for sentence to quarter sessions, that is to say, to the appeal committee under the new provision in the Criminal Justice Act of 1948. It is said that because the appeal committee had the ordinary papers before them, which they must have to deal with the matter of sentence, that that in some way invalidates the conviction. In my opinion, it does not. The papers have to go to the chairman, for a list is prepared of the cases. The applicant applied to the chairman for legal aid, and he naturally wanted to see the notes of evidence to see what the case was about before he decided to give legal aid, and I cannot see any reason why the notes of evidence should not be supplied to quarter sessions even when it happens, as in this case, that a person sent forward for sentence wants to appeal against the conviction, because it often comes to a question whether a person has said something below which contradicts his evidence. Parliament has determined that cases which go forward for sentence ought to be dealt with not by the full court of quarter sessions but the appeal committee. The appeal committee is the only body now that can hear appeals from justices, and it happens over and over again that people who are sent forward for sentence also desire to appeal against their conviction. Parliament might have provided that if an appeal was entered, the determination of the sentence ought to go to a different body, but it has not; it has determined that it shall go to the same body. As a matter of practice and machinery, it is obvious that every justice who is sitting on the appeal must know at the same time that the appellant has been sent forward for sentence, and I am sure that justices can be trusted to try an appeal fairly. From time to time this court knows that justices have quashed the conviction of a person sent forward for sentence.

In this case the court cannot see any reason for saying that justice was not done, and this application fails and must be refused.

Lynskey J. I agree.

Pearson J. I also agree.

*Application dismissed.*

Solicitors: *Kinch & Richardson for H. C. N. Lambert, Bournemouth; Booth & Blackwell for C. P. Brutton, Dorchester.*

J. F. L.

1956 *Jan.* 30.

Ormerod J.

## PRESTON AND ANOTHER *v.* HUNTING AIR TRANSPORT LTD.

[1953 P. No. 439.]

*Aircraft — Carriage by air — International carriage — Passenger ticket — Woman passenger killed in air crash — Ticket issued by air transport company—Particulars of agreed stopping places omitted — Whether "passenger ticket" delivered — Extent of carrier's liability — Claim by two infant children of widowed mother —"Damage sustained"—Carriage by Air Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 36), *s.* 1 (1), *Sch.* 1, *c. II, art.* 3 (1) (*c*), (2), *c. III, arts.* 17, 22.

By article 3 (1) of the First Schedule to the Carriage by Air Act, 1932 [1] (which incorporates the Warsaw Convention for the Unification of rules relating to International Carriage by Air) a carrier of passengers "must deliver a passenger ticket which shall "contain the following particulars . . . (c) the agreed stopping "places. . . ." By article 3 (2): "The absence, irregularity or loss "of the passenger ticket does not affect the existence or the validity "of the contract of carriage which shall none the less be subject "to the rules of this Convention. Nevertheless, if the carrier "accepts a passenger without a passenger ticket having been "delivered" he shall not be entitled to avail himself of the provisions of article 22 which limits his liability.

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[1] Carriage by Air Act, 1932, First Sch., c. II, art. 3: "(1) For the carriage of passengers the carrier must "deliver a passenger ticket which "shall contain the following particulars:—. . .

"(*c*) the agreed stopping places, "provided that the carrier may "reserve the right to alter the "stopping places in case of "necessity, and that if he exercises that right, the alteration "shall not have the effect of depriving the carriage of its "international character; . . .

"(2) The absence, irregularity or "loss of the passenger ticket does not "affect the existence or the validity of "the contract of carriage, which shall "none the less be subject to the rules "of this Convention. Nevertheless, "if the carrier accepts a passenger "without a passenger ticket having "been delivered he shall not be entitled to avail himself of those provisions of this Convention which "exclude or limit his liability."

Chap. III, art. 17: "The carrier is "liable for damage sustained in the "event of the death or wounding of "a passenger or any other bodily "injury suffered by a passenger, if "the accident which caused the "damage so sustained took place on "board the aircraft or in the course "of any of the operations of embarking or disembarking."

Art. 22: (1) "In the carriage of "passengers the liability of the carrier for each passenger is limited "to the sum of 125,000 francs. . . ."

A ticket issued by an air transport company to the widowed mother of two young children for a flight from London to Kenya in one of their aircraft did not contain the names of the agreed stopping places, namely, Nice and Malta. All the occupants of the aircraft were killed when the plane crashed. In an action brought under article 17 on behalf of the two orphan children for damages for loss sustained as a result of their mother's death, it was contended that as her ticket did not comply with the provisions of article 3 (1) it was not a "passenger ticket" as defined by that article and that therefore no passenger ticket had been delivered, so that the defendants were precluded by article 3 (2) from relying on article 22 as limiting their liability for damages:—

*Held*, (1) that the fact that there was a deficiency in the ticket, namely, the omission of the agreed stopping places, did not mean that no ticket had been delivered and, therefore, the plaintiffs could not rely on article 3 (2) as depriving the defendants of the limitation of liability provided by article 22, and, accordingly, the damages must be limited to the sum laid down by that article.

*Grey* v. *American Airlines Inc.* (1950) 95 Fed.Sup. 756 applied.

*Held*, (2) that as the carrier's liability under article 17 was for "damage sustained in the event of the death . . . of a passenger" and not for the "financial loss" so sustained, the plaintiffs were entitled to be compensated for the loss of their mother's care in addition to the financial loss occasioned to them as a result of her death.

ACTION.

The infant plaintiffs, Deirdre Evelyn Antoinette Preston and Nigel Philip Preston, aged three and four years, were the children of Mrs. Sophie Marguerite Preston who, prior to her death in February, 1952, had lived in Kenya where her husband was engaged in the development of a tea estate. After her husband's death in 1951 Mrs. Preston came to England with one of her children for the purpose of dealing with her husband's affairs. On February 16, 1952, she was flying back to Kenya in an aircraft, the property of the defendants, Hunting Air Transport, Ltd., which was scheduled to stop at Nice and Malta, when, having stopped at Nice, the aircraft flew off course while en route to Malta and struck a mountain in Sicily with the result that it was wrecked and all the occupants were killed.

It was admitted that the contract made between the defendants and Mrs. Preston, pursuant to which she was travelling as a passenger for reward in the defendants' aeroplane on the day of her death, was a contract of international carriage as defined by article 1 (2) of the First Schedule to the Carriage by Air Act, 1932, which sets out the Warsaw Convention for the Unification of Rules relating to International Carriage by Air.

In an action for damages brought under article 17 of the Schedule, the infant plaintiffs, suing through Jerome Charles Dusseau as their next friend, contended that the document issued to their mother entitling her to make the journey and purporting to be a passenger ticket was not a "passenger ticket" as defined by article 3, in that it did not contain particulars of the agreed stopping places, and that therefore the defendants were not entitled to avail themselves of the provisions of the Schedule which excluded or limited their liability. They accordingly claimed the full measure of damages for the loss they had sustained by the death of their mother.

The defendants contended that the plaintiffs were severally entitled, by virtue of article 17, to recover the amount of pecuniary loss occasioned to either of them by the death of their mother up to, but not exceeding, a total of £2,939 13s. 4d. (the equivalent in sterling of 125,000 francs) as provided by article 22, upon which they relied. They denied that the ticket issued to the deceased was not a "passenger ticket" as defined by article 3 and contended that even if it did not contain the names of the agreed stopping places on the route from London airport to Kenya it was nevertheless a passenger ticket within the meaning of that article.

[Claims by the infant plaintiffs under the Fatal Accidents Act, 1846, and by Daphne Agnes Stobbs, the sister of the deceased, under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix of the deceased's estate, were not proceeded with.]

*C. A. Morgan Blake* for the plaintiffs. The contract between the deceased and the defendant company was a contract of international carriage to which the Carriage by Air Act, 1932, applied. By article 3 (1) of the First Schedule to the Act, which incorporates the Warsaw Convention, the names of the agreed stopping places on the route have to be stated on the ticket. It is common ground that they were not so stated. Therefore, as the defendant company failed to comply with the conditions set out in article 3 (1), it is submitted that the ticket issued was not a "passenger ticket" at all within the meaning of the article. In those circumstances, by virtue of article 3 (2), the defendant company cannot rely upon the limitation of liability conferred by article 22 and the plaintiffs are entitled to the full measure of damages for the loss suffered.

*C. Rodger Winn* for the defendant company. This is a simple matter of the construction of article 3 (2). The first part of that article contemplates "the absence, irregularity or loss" of a passenger ticket, and states that none of those matters shall affect the validity of the contract which shall none the less be subject to the rules of the Convention. The second part of the article refers only to the complete absence of a ticket, and it is submitted that that sentence applies only where the company has accepted a passenger without delivering a ticket at all. In the present case a ticket was delivered, although, admittedly, it was deficient in some particulars. Assistance in construing the words of article 3 (2) can be derived from contrasting them with the words of other articles which relate to luggage tickets and air consignment notes: see articles 4, 8 and 9.

There is no English authority on the point under consideration, but exactly the same question arose in *Grey* v. *American Airlines Inc.*,[2] a decision of the District Court for the southern district of New York. In that case an action for damages was brought on behalf of two infant children whose parents had been killed in an air crash in America while on a flight to which the Convention applied. It was held that the failure of the tickets to include the names of the agreed stopping places did not render the liability of the aircraft corporation unlimited. It is submitted that the judgment in that case is correct and it is adopted as part of this argument. The plaintiffs are not entitled to damages at large, but to a sum not greater than that stated in article 22.

*Morgan Blake* in reply. *Grey's* case [2] is distinguishable because it was decided on the American translation of the Convention, which uses different terms from those in the translation now under consideration. Moreover, in *Grey's* case [2] the crash took place in Dallas, Texas, within the territorial limits of the United States. Where there is a contract for internal transport a special contract can be arranged enabling the parties to contract out of the Convention, but where the contract is one for international transport the Convention is completely binding.

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[2] (1950) 95 Fed.Sup. 756.

As to the meaning of article 3 (2), the draftsman was concerned to see that the ticket contained words to show that it was a contract of international transport subject to the limited liability of the carriers. If the names of the agreed stopping places are not put in, the ticket bears no relation to the requirements for a passenger ticket laid down by article 3 (1), and in those circumstances the carrier's liability cannot be subject to any limit. It may be that the requirements for luggage tickets laid down by the Convention are different, but this is a passenger ticket and it is idle for the defendant company to issue a ticket in a form different from that required by the Convention and yet to seek to rely upon its provisions to limit their liability.

ORMEROD J. stated the facts, read article 17 of the First Schedule to the Carriage by Air Act, 1932, and continued: Mr. Winn, on behalf of the defendants, agrees that the legal position here is that in the absence of positive evidence of certain matters the defendants are, under article 17, prima facie liable to compensate the plaintiffs for the loss they have sustained, and he has not disputed that, in the present case, there is that liability; but the plaintiffs say that not only is there liability and not only are the defendants liable to pay damages to them for the loss they have sustained, but that, by reason of the provisions of the schedule, the amount which the court may award in damages is unlimited and entirely at large.

Article 22 of chapter III of the First Schedule to the Act of 1932 provides: "In the carriage of passengers the "liability of the carrier for each passenger is limited to the sum "of 125,000 francs." That, I am told, is agreed by the parties at the present time to be equivalent to £2,939 13s. 4d. in English money and therefore, on the face of it, having regard to the provisions of article 22, the limit which can be awarded for the two children—that is to say, the combined damages—is the sum of £2,939 13s. 4d. But Mr. Morgan Blake argues that article 22 does not apply in the present case because of the provisions of article 3, which are contained in chapter II of the Schedule to the Act. [His Lordship read the relevant words of article 3 (1) and (2) and continued:] In other words, the carrier should not be entitled to avail himself of the provisions of article 22 which limit his liability to the sum of 125,000 francs.

It was argued on behalf of the plaintiffs that as the ticket in question did not contain the names of the agreed stopping places, it did not comply with article 3 (1), which sets out the matters which the ticket shall contain, that it was therefore not a ticket at all and that article 3 (2) applied, the result being that there would be no limit to the liability in respect of these plaintiffs. It is admitted on behalf of the defendants that, for some reason, be it carelessness or be it intention—there is no evidence about it—the names of the agreed stopping places were not inserted on the ticket.

The first question I have to decide, on the interpretation of article 3 (2), is whether the present case is one where the liability is limited in accordance with article 22 or whether it is a case where liability is not limited because no ticket was, in fact, delivered to the passenger in respect of this contract of carriage.

Mr. Morgan Blake puts his argument quite shortly and succinctly—and, indeed, there is only one way in which it can be put—when he says that if a ticket does not contain the matters which the article says that it shall contain, it is not a ticket and under those circumstances cannot be regarded as a ticket. Mr. Winn, in answer to that, says that in the first place the natural meaning of the words is simply this: Article 3 (2) deals with three matters, the absence of a ticket, the irregularity in a ticket, or the loss of a ticket, and states that none of those things shall affect the "validity of the contract of "carriage, which shall none the less be subject to the rules of "this Convention." It goes on to deal with one of those three matters only, that is to say, the absence of a ticket, and provides: "Nevertheless, if the carrier accepts a passenger without a "passenger ticket having been delivered he shall not be entitled "to avail himself of" the provisions limiting liability. That, argues Mr. Winn, is the obvious natural meaning of the words and that is the interpretation which should be put upon them. The second part of article 3 (2) does not deal with irregularity or loss of a passenger ticket; it deals simply with its absence.

In support of that argument I have had cited to me articles 4, 8 and 9 of the Convention. Article 4 deals with a luggage ticket and provides that there shall be a luggage ticket and that "(3) The luggage ticket shall contain the following particulars" and then sets out a list of particulars from (*a*) to (*h*). Article 4 (4) goes on to provide: "The absence, irregularity or loss of the "luggage ticket does not affect the existence or the validity of "the contract. . . . Nevertheless, if the carrier accepts luggage "without a luggage ticket having been delivered, or if the luggage "ticket does not contain the particulars set out at (*d*) (*f*) and (*h*) "above, the carrier shall not be entitled to avail himself of those "provisions of the Convention which exclude or limit his "liability." In other words, it is argued on behalf of the defendants that in article 4 (3) there are provisions which set out the matters which must be included in the ticket, and in sub-article (4) there is a provision dealing with "The absence, "irregularity or loss of the luggage ticket. . . ." But then the second part of that sub-article deals only, on this occasion, not with one, but with two of these matters—absence or irregularity—and provides that if there is no ticket or if the ticket is deficient not in all but in some of the particulars set out in sub-article (3), then under those circumstances the defendants shall not be entitled to avail themselves of the limitation of liability.

Equally article 8, which deals with air consignment notes, sets out a long list from (*a*) to (*q*) of the matters which should be contained in that note; but again article 9 provides that the carrier—that is the aircraft company—" . . . shall not be entitled "to avail himself of the provisions of this Convention which "exclude or limit his liability" if the goods are accepted ". . . without an air consignment note having been made out, "or if the air consignment note does not contain all the particu-"lars set out in article 8 (*a*) to (*i*) inclusive and (*q*)," in other words, specifying the essential matters which must be included in the consignment note if it is to be one which is sufficient to allow article 22 to come into play.

On that argument the defendants submit that although admittedly the passenger ticket was defective in that it did not contain the names of the agreed stopping places, nevertheless the provisions of article 22 still apply because the exclusion of limitation of liability only applies if, in fact, there is no ticket, that is to say, if the ticket is absent. In the present case it is argued that there was a ticket. It may be that the ticket was deficient, but it was there.

There appears to be no English authority on this matter, and the only authority cited was a case of similar facts decided in the United States of America in the District Court in the Southern District of New York, *Grey* v. *American Airlines Incorporated*,[1] where exactly the same point was taken on a Convention which is in substantially the same words as that set out in the First Schedule to the Carriage by Air Act, 1932, and which, indeed, differs only in the fact that it is another translation of the original Convention which was in French. In that case the court decided that there was limitation of liability in spite of the fact that the ticket did not contain the names of the intermediate agreed stopping places.

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[1] (1950) 95 Fed.Sup. 756.

Having regard to the arguments I have heard I have no doubt in the present case in coming to the conclusion that the fact that this passenger ticket was deficient in that it did not contain the names of agreed stopping places did not mean that no ticket had been delivered, and did not mean that the plaintiffs could take advantage of article 3 (2) and pursue their action without any limitation on the amount set out in article 22 of the schedule. It follows from that that the largest amount of damages which I can award in pursuance of this Convention is the sum of £2,939 13s. 4d. The question then arises what figure, not larger than that sum, should I award for the loss which these children have sustained? It has been submitted by Mr. Winn that I must deal with this purely on the basis of financial loss, that I cannot take into account any other matters than the actual financial loss sustained by the plaintiffs by reason of the death of their mother under these circumstances.

Article 17 of the schedule upon which this claim is founded provides: "The carrier is liable for damage sustained in the "event of the death or wounding of a passenger or any other "bodily injury suffered by a passenger, if the accident which "caused the damage so sustained took place on board the air- "craft. . . ." It does not refer particularly to financial loss, it refers to damage, and the question does arise—and it is probably a very important question in this case—whether that damage should be calculated purely on what may be estimated as the financial loss which these infants have sustained, or whether it should be calculated on the broader basis of the loss which they inevitably must have sustained beyond the actual financial loss by the fact that they lost their mother as young children aged some three or four years, who were, at the time of her death, already deprived of a father. As I interpret the words of article 17 it does seem to me that this is an item of damage for which the plaintiffs are entitled to be compensated. I must take into account, in calculating any sum which should be awarded to them, something more than the purely financial loss and award some sum—a sum extremely difficult to arrive at—for the loss which they have sustained by reason of the fact that they have lost the care of their mother at an age when probably they needed it most.

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[His Lordship then considered the evidence relating to the financial position of the plaintiffs, and continued:] From all the evidence before me I think I am bound to come to the conclusion that the mother would have made every effort to have brought up the children and to have educated them as well as she could, and to have devoted every available penny which she had to spare for that purpose. Therefore I have to calculate as well as I can a sum which I ought to award in view of the damage which these children have sustained, substantially the financial loss, but to some extent taking into account the fact that these children have sustained damage possibly of a more intangible character by reason of the loss of their mother, and I must subtract from that sum the amount which they have received under the trusts of their great grandfather and his brother, a sum amounting to £1,580. Taking all those matters into account, I think the proper figure that I should award is £2,420 and I give judgment for that sum.

*Judgment for plaintiffs for £2,420. Stay of execution for 21 days in respect of £400 awarded for damage other than financial loss.*

Solicitors: *Leonard Tubbs & Co.; Barlow, Lyde & Gilbert.*

E. M. W.

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1955
*June* 30;
*July* 1;
*Oct.* 7.

McNair J.

C. A.

1955
*Dec.* 14, 15,
16, 19, 20.

Singleton,
Jenkins and
Hodson L.JJ.

## G. H. RENTON & CO. LTD. v. PALMYRA TRADING CORPORATION OF PANAMA.

[1954 G. No. 2673.]

*Shipping—Bill of lading—Port of discharge—Bills of lading providing for delivery of timber at London and Hull—Strike, etc., clause—Meaning of "delay"—Clause permitting discharge of cargo "at "port of loading or any other safe and convenient port" such discharge to "be deemed due fulfilment of contract"—Validity—Water Carriage of Goods Act,* 1936, *of the Dominion of Canada* (1 *Edw.* 8, *c.* 49), *s.* 2, *Sch., arts. III, rr.* 2, 8; *IV, r.* 4.
*Contract—Construction—Repugnancy—Exceptions clause.*

Timber was shipped at Canadian ports under bills of lading "for carriage to London or Hull or so near thereunto as the vessel "may safely get . ." They incorporated the Hague Rules as enacted by the (Canadian) Water Carriage of Goods Act, 1936. The bills of lading provided, by clause 14 (*c*) of the printed conditions, that "should it appear that . . . strikes . . . would "prevent the vessel from . . . entering the port of discharge or "there discharging in the usual manner and leaving again . . . "safely and without delay, the Master may discharge the cargo "at port of loading or any other safe and convenient port . . ." By clause 14 (*f*) "the discharge of any cargo under the provisions "of this clause shall be deemed due fulfilment of the contract."

The vessel left Nanaimo, British Columbia, on September 3, 1954. While she was on passage a strike broke out in the port of London and later in the port of Hull and the defendant shipowners caused the ship to proceed to Hamburg and there discharge the timber. The shipowners took no steps to forward it to London at their own expense but made it available to the plaintiffs, the indorsees and holders of the bills of lading, at Hamburg on payment of full freight. The plaintiffs claimed damages for breach of contract, but the defendant shipowners contended that by discharging at Hamburg they had effected due delivery under the bills of lading:—

*Held*, (1) that although a printed condition in such a contract which defeats the main object and intention of the parties must be limited or disregarded, clause 14 (*c*), coupled with clause 14 (*f*), was not repugnant to or inconsistent with the main object or intention of these contracts.

*Per* Jenkins L.J. There is a material difference between a deviation clause purporting to enable shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as these which are operative only in the event of a specified emergency.

*Glynn* v. *Margetson* [1893] A.C. 351 distinguished.

Dicta in *Tillmanns & Co.* v. *Knutsford S.S. Ltd.* [1908] 1 K.B. 185; and dictum of Greer J. in *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.* (1920) 2 Ll.L.Rep. 639 applied.

*Per curiam.* Clause 14 (*c*) should not be construed so as to confine the word "delay" to delay so inordinate as to render the performance that of a substantially different contract.

*Held*, (2) that there is nothing in the Hague Rules that imposes any stipulation as to the termini of any given voyage; and that clause 14 (*c*) and (*f*) was accordingly valid and effective.

Such an agreement between the parties involved no breach of article III, r. 2, of the Rules, which provides that the carrier shall "properly and carefully load . . . carry . . . and discharge the "goods carried" since that applies only to the method of loading, carrying and discharging the cargo and not to the place at which the cargo is to be discharged.

Statement in Carver, Carriage of Goods by Sea, 9th ed., p. 186, that the object of the Rules is to define not the scope of the contract service but the terms on which that service is to be performed, approved.

Dicta of Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402 at p. 417; [1954] 2 All E.R. 158 applied. Decision of McNair J. reversed.

ACTION.

The defendants, Palmyra Trading Corporation of Panama, were the owners of the *S.S. Caspiana* (hereinafter referred to as "the vessel"). The plaintiffs, G. H. Renton & Co. Ltd., were at all material times the indorsees and holders of four bills of lading acknowledging shipment of certain quantities of timber on board the vessel at Vancouver and Nanaimo, British Columbia, Canada, for delivery at London or Hull. The property passed to the plaintiffs on or by reason of the indorsement of the bills of lading to them. Two bills of lading, LN4 and LN5, covered 2,702 pieces of fir timber shipped at Vancouver for London, another, LN78, covered 574 pieces of fir timber shipped at Nanaimo for London. The timber covered by that bill of lading was stated to be and was in fact carried on deck and was outside the ambit of the Hague Rules, which were incorporated in the bills of lading as enacted in the country of shipment. In the present case the Water Carriage of Goods Act, 1936, of the Dominion of Canada and the Rules scheduled thereto [1] applied. The fourth bill of lading, H60, covered 6,192 pieces of fir hemlock and balsam timber shipped at Nanaimo for Hull. All the timber covered by bills of lading LN4, LN78 and H60 was carried under deck. Save that bill of lading LN78 stated, as was the fact, that the timber was "all on deck" the bills of lading were all in the same form. For the purposes of the judgment bill of lading LN4 was taken as typical. It provided, so far as material, as follows: "Shipped at Vancouver B.C. in apparent good order and

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[1] Water Carriage of Goods Act, 1936, s. 2: "Subject to the provisions "of this Act, the Rules relating to "bills of lading as contained in the "Schedule to this Act . . . shall "have effect in relation to and in "connexion with the carriage of goods "by water in ships carrying goods "from any port in Canada to any "other port whether in or outside "Canada."

Article III, r. 2, of the Schedule: "Subject to the provisions of Article "IV, the carrier shall properly and "carefully load . . . carry . . . and "discharge the goods carried."

Rule 8: "Any clause, covenant or "agreement in a contract of carriage "relieving the carrier or the ship "from liability for loss or damage to "or in connexion with goods arising "from negligence, fault or failure in "the duties and obligations provided "in this Article or lessening such "liability otherwise than as provided "in these Rules, shall be null and "void and of no effect."

Article IV, r. 4: "Any deviation "in saving or attempting to save life "or property at sea, or any reason- "able deviation shall not be deemed "to be an infringement or breach of "these Rules or of the contract of "carriage, and the carrier shall not "be liable for any loss or damage "resulting therefrom."

"condition . . . by A. Sereth Lumber Co. Ltd. on board the good "vessel called the *Caspiana* for carriage to London, England, or "so near thereunto as the vessel may safely get always afloat "the following goods: ASL/K 619 Canada 1333 pcs. Douglas "Fir lumber loaded on board *S.S. Caspiana* subject to Chamber "of Shipping War Risks Clauses Nos. 1 and 2 . . . which are to "be delivered in the like good order and condition at the afore-"said port unto order of shipper (Notify Lloyd Duncan & Co. "Ltd., Cross Keys House, 56, Moorgate, London) . . . or his "or their assigns he or they paying freight plus other charges "incurred in accordance with the provisions contained in this "bill of lading: Freight: collect at destination: £247 9s. 7d. "In accepting this bill of lading the merchant expressly accepts "and agrees to all its stipulations, whether written, printed, "stamped or otherwise incorporated, as fully as if they were "all signed by the merchant."

The bill of lading was signed by the master at Vancouver on August 23, 1954. It contained in addition a number of printed conditions and stipulations of which the following were material:

"II. Paramount clause: The Hague Rules contained in the "International Convention for the unification of certain rules "relating to bills of lading dated Brussels, August 25, 1924, as "enacted in the country of shipment shall apply to this con-"tract . . . With respect to goods loaded at a Canadian port, "the Water Carriage of Goods Act, 1936, of the Dominion of "Canada shall be effective." (So far as is material for the purpose of the present case, the Canadian Water Carriage of Goods Act, 1936, is in the same terms as the Carriage of Goods by Sea Act, 1924.)

By clause III. 2: "The scope of voyage: The voyage herein "undertaken shall include usual or customary or advertised "ports of call whether named in this contract or not, also ports "in or out of the advertised, geographical, usual or ordinary "route or order, even though in proceeding thereto the vessel "may sail beyond the port of discharge or in a direction contrary "thereto, or depart from the direct or customary route. The "vessel may call at any port for the purpose of the current "voyage or of a prior or subsequent voyage. The vessel may "omit calling at any port or ports whether scheduled or not, and "may call at the same port more than once; may, either with "or without the goods on board, and before or after proceeding "towards the port of discharge, adjust compasses, dry-dock, go "on ways or to repair yards, shift berths, undergo degaussing, "wiping or similar measures, take fuel or stores, land stowaways, "remain in port, sail without pilots, tow and be towed, and save "or attempt to save life or property, and all of the foregoing "are included in the contract voyage."

"3. Forwarding, substitute of vessel, through cargo and "transhipment: Whether expressly arranged beforehand or "otherwise, the carrier shall be at liberty to carry the goods "to their port of destination by the said or other vessel or vessels "either belonging to the carrier or others, or by other means "of transport, proceeding either directly or indirectly to such "port and to carry the goods or part of them beyond their port "of destination and to tranship, land and store the goods either "on shore or afloat and reship and forward the same at carrier's "expense but at merchant's risk. When the ultimate destination "at which the carrier may have engaged to deliver the goods "is other than the vessel's port of discharge, the carrier acts as "forwarding agent only."

"14. Government directions, war, epidemics, ice, strikes, etc. "(*a*) The ship shall have liberty to comply with any orders or "directions as to departure, arrival, routes, ports of call, "stoppages, destination, delivery or otherwise however given by "the Government of the nation under whose flag the vessel sails "or any department thereof, or by any other Government or any "department thereof, or any person acting or purporting to act "with the authority of such Government or of any department "thereof or by any committee or person having under the terms "of the war risks insurance on the ship, the right to give such "orders or directions and if by reason of and in compliance with "any such orders or directions anything is done or is not done, "the same shall not be deemed a deviation, and delivery in "accordance with such orders or directions shall be a fulfilment "of the contract voyage and the freight shall be payable "accordingly."

(The above clause was referred to in the course of the case as the Chamber of Shipping War Clause No. 1.)

"(*b*) Should it appear that the performance of the transport "would expose the vessel or any goods on board to the risk of "seizure or damage or delay resulting from war, warlike operations, blockage, riots, civil commotions, or piracy, or any "person on board to the risk of loss of life or freedom, or that "any such risk has increased, the master may discharge the "cargo at port of loading or any other safe and convenient port."

"(c) Should it appear that epidemics, quarantine, ice—labour "troubles, labour obstructions, strikes, lockouts, any of which "on board or on shore—difficulties in loading or discharging would "prevent the vessel from leaving the port of loading or reaching "or entering the port of discharge or there discharging in the "usual manner and leaving again, all of which safely and without "delay, the master may discharge the cargo at port of loading or "any other safe and convenient port."

"(f) The discharge of any cargo under the provisions of "this clause shall be deemed due fulfilment of the contract. "If in connexion with the exercise of any liberty under this "clause any extra expenses are incurred, they shall be paid by "the merchant in addition to the freight, together with return "freight if any and a reasonable compensation for any extra "services rendered to the goods."

The following statement of facts was agreed:

After loading on board the quantities of timber stated in the bills of lading at the ports of Vancouver and Nanaimo, British Columbia, the vessel on or about September 3, 1954, sailed for the United Kingdom, Nanaimo being her last port of loading on the Pacific coast. At the time of sailing from Nanaimo labour relations were tranquil at United Kingdom ports generally, including London and Hull. There was at that time no special indication that any strike or stoppage of work by dock labour might shortly arise. The vessel passed through the Panama Canal on September 22, and proceeded upon her voyage across the Atlantic. On September 28, following a dispute between certain London dockers and their employers, the work of unloading the motor-vessel *Haparangi* at the Royal Albert Docks was stopped. On September 30, workmen in the Royal group of London Docks struck in sympathy with the workmen involved in this dispute, and by October 13, the Port of London was virtually at a standstill. At that date there was no similar strike at other United Kingdom ports, although at all the major ports (including Hull) and at some continental ports, dockers, while freely unloading cargo originally destined for the port in question, were refusing to unload cargo diverted to that port from London. On October 12 a meeting of London dockers voted to continue the strike.

The vessel was due to arrive off Dungeness at 4 p.m. on October 13, and to dock in London on October 14. The defendants, by cable, dispatched at 1 p.m. on October 12, ordered the vessel to proceed to Antwerp to discharge the London cargo there; but on learning that the dockers at Antwerp would not unload cargo diverted from London, the defendants, on October 13, instructed the master to proceed to Hamburg and there discharge the London cargo. The vessel proceeded accordingly and, arriving at Hamburg on October 15, began to discharge the cargo originally destined for London on October 16, discharge of that cargo being completed on October 26 without any voluntary delay on the part of the defendants. During the whole of that time the strike in the London Docks continued.

By October 20 the strike had spread to certain other ports, including Hull. On October 25, the dockers at both Hull and London still being on strike and there being no information about the probable duration of the strike, the defendants' agents informed the plaintiffs that the Hull cargo would be discharged at Hamburg. The discharge of this cargo was begun on October 26 and completed on November 1. On October 30 dockers at the eight United Kingdom ports then affected by the strike, namely, London, Liverpool, Birkenhead, Garston, Manchester, Hull, Southampton and Rochester, voted to return to work on November 1, and on that day work was accordingly resumed at those ports. On the same day a further, though smaller, strike broke out in London, but by November 4 there was a full resumption of work in London.

After completing discharge of the Hull cargo on November 1, the vessel sailed for Immingham, where she arrived on November 2, to discharge the cargo for that port. After the discharge in Hamburg of the timber destined for London and Hull respectively, the defendants took no steps to forward or tranship the same to the relevant port of destination, nor did they pay the cost of such transhipment or forwarding, or of storage at Hamburg during the period between discharge and such transhipment or forwarding, claiming that by discharging at Hamburg they had performed their contract. The plaintiffs, expressly without prejudice and under reserve of all rights against the defendants in respect of the above matters, paid the original freight due under each of the bills of lading. The cost of storage at Hamburg and of forwarding the goods to London and Hull had been, or would be, borne by the plaintiffs.

It was also agreed that by reason of the defendants' discharging the plaintiffs' cargo destined for London and Hull at Hamburg instead of at London and Hull, the plaintiffs had suffered damage. The only issue for the court to determine was that of liability. There was also agreement on the following facts: If the defendants were entitled to discharge the cargo originally destined for

London and/or Hull at some other port, it was not alleged that Hamburg was not a safe port, nor that it was not a port at which it was convenient to the defendants to discharge. It was, however, a port which was not convenient to the plaintiffs to the extent that they had bought the goods under contracts made upon "c.i.f. London" and "c.i.f. Hull" terms respectively. But if it were held that the goods could lawfully be discharged and delivery made at ports other than London and Hull, it was not contended that there was available at the dates the vessel discharged any port more convenient or less inconvenient to the plaintiffs than Hamburg.

In the events which occurred: (a) a vessel arriving at London on or after October 13 could not have begun discharging until at least the end of the main strike on November 1; and (b) cargo originally destined for London could not have been discharged at Hull or Immingham during the period of the London Dock strike, and the cargo destined for Hull could not have been discharged during the period of the strike there, namely, from October 20 to November 1. The parties agreed that the court should be at liberty to draw all requisite inferences of fact.

The plaintiffs as owners of the goods and/or the holders of the bills of lading, alternatively as indorsees of the bills of lading, claimed damages for breach of contract. They alleged that in breach of the contracts contained in or evidenced by the bills of lading and/or of their duty thereunder and/or under the Canadian Water Carriage of Goods Act, 1936, and the Rules scheduled thereto, the defendants, their servants or agents failed properly and carefully to handle, carry, keep, care for and discharge the goods and/or failed to deliver the goods to the plaintiffs at the respective ports of delivery, in that they did not discharge or carry any of the goods to the ports of delivery but caused the vessel to deviate and carried them to Hamburg and there discharged them, and failed to cause the goods to be forwarded to the respective ports of delivery at their expense, by reason of which the plaintiffs had suffered damage.

The defendants contended that the ports of delivery under the bills of lading were not necessarily London and Hull but were London (or Hull) as the case might be, or such other port as might be selected in accordance with clause 14 of the bills of lading. They denied that delivery and discharge at Hamburg was any breach of contract, contending that in view of the labour troubles, strikes and difficulties in discharging which would prevent the vessel from entering the ports of London and Hull and discharging in those ports in the usual manner and without delay, the master was entitled to and did discharge the goods at Hamburg, which was a safe and convenient port, and the contract was thereby fulfilled. They denied that the vessel deviated but contended that if there was a deviation it was reasonable.

*A. A. Mocatta Q.C.* and *R. A. MacCrindle* for the plaintiffs.
*T. G. Roche Q.C.* and *Andrew Bateson* for the defendants.

The cases cited in argument are referred to in the judgment.

Oct. 7. McNair J. This case raises some interesting questions as to the extent to which a shipowner who issues a bill of lading for a named port of discharge is entitled, either at common law or under the Hague Rules incorporated in the bill of lading, to modify his prima facie obligation to deliver the goods at that named port of discharge by appropriate deviation or liberty clauses in the bill of lading and to claim that, when discharge at the named port becomes, for example, by reason of strikes, difficult or impracticable without undue delay, delivery at some other destination is due performance of his contract.

[His Lordship read the relevant clauses of the bills of lading, stated the facts as set out above, and continued:] I hold that if under the bills of lading the defendants were in law entitled in any event to discharge their contractual obligations by delivery in Hamburg, the existing strike situation was at all material times such that the defendants could not be said to have acted unreasonably in deciding to deliver both the London and the Hull cargo at Hamburg.

On this state of facts Mr. Mocatta for the plaintiffs, emphasizing that (as is apparently the fact) under no reported decision has the shipowner been held entitled to deliver elsewhere than at the destination named in the bill of lading, summarized his submissions as follows:

A. Under the Hague Rules: (1) that inasmuch as the bills of lading state the contract voyage to be from Vancouver or Nanaimo to London or Hull, the provision in article III, r. 2, that "the carrier shall properly and carefully . . . carry . . . and "discharge the goods" involves an obligation to discharge at London or Hull and that any clause or stipulation in the bills of lading which purports to entitle the carrier in any circumstances to deliver elsewhere is avoided by article III, r. 8, as being a clause which relieves the carrier from liability for failure to perform this obligation; (2) that, if and in so far as the clauses in the bills of lading purport to allow deviation in terms wider than article IV, r. 4, they are similarly avoided; (3) that, if it is possible to draft clauses in a bill of lading so as to include within the definition of the contract voyage action taken pursuant to liberty or deviation clauses, the particular clauses relied upon by the shipowner in the present case do not achieve that object; and (4) that the particular clauses relied upon, namely clause 14, paragraphs (*c*) and (*f*), if given their literal meaning, would permit the shipowner to discharge the goods at Vancouver, the port of loading, and claim full freight: such provision would clearly be avoided by the Rules and, if part of the clause was bad, the whole clause was avoided.

B. Apart from the Act; that clause 14, paragraphs (*c*) and (*f*) of the bill of lading (which alone in terms give the defendants the protection they claim) must as a matter of construction be disregarded as being inconsistent with the express promise to deliver at London or Hull or on the ground that to give effect to it would be to defeat the main object and intent of the contract.

Mr. Roche on the other hand, on behalf of the shipowners, took his stand primarily on the following submissions: (1) that the bills of lading in question as a matter of construction expressly provided that in certain events (for example, strikes) there should be an alternative port of discharge to London or Hull, and that no principle of the common law prevented such construction being adopted; (2) that the words "properly and "carefully" in article III, r. 2, of the rules mean only "in "proper manner and with due care," and do not relate to the place of discharge.

In my judgment the logical and proper mode of approach to the problems raised in this case is first to consider whether apart from the Act and Rules the bills of lading properly construed justify the defendants' action. If they do not, the defendants' position cannot be improved under the Act and Rules; if they do, I must next consider how far, if at all, the Act and Rules cut down the defendants' rights.

I turn therefore to the position at common law. On this aspect of the problem no question of public policy arises. The question is merely one of the construction of a written document such as a bill of lading according to the settled principles which guide the court in that task.

In *Glynn* v. *Margetson*[1] oranges were shipped on board a steamship under a bill of lading which stated that the ship was "then lying in the port of Malaga and bound for Liverpool" (the name of this port being filled in in writing) "with liberty "to proceed to and stay at any port or ports in any rotation in "the Mediterranean, Levant, Black Sea or Adriatic or on the "coast of Africa, Spain, Portugal, France, Great Britain and "Ireland for the purpose of delivering coals, cargo, or passengers, "or for any other purpose whatsoever." The ship left Malaga for a port on the east coast of Spain and out of her course for Liverpool, then returned and made for Liverpool where the oranges were delivered in a damaged condition owing to the delay. The House of Lords held that the printed clause must not be construed so as to defeat the main object and intent of the contract, which was to carry the oranges from Malaga to Liverpool, and that the liberty must be restricted to ports which were in a commercial sense on the course of the voyage. In that case it is to be observed that, as in the other cases to which I shall refer, delivery was ultimately made by the shipowner at the named port of destination. Further, it is to be noted that in the case in question the House did not in fact reject any of the printed words but merely applied to them a restrictive interpretation. But Lord Halsbury used this language[2]: "Looking at the whole of the instrument, and seeing what one must "regard . . . as its main purpose, one must reject words, "indeed whole provisions, if they are inconsistent with what "one assumes to be the main purpose of the contract. The "main purpose of the contract was to take on board at one "port and to deliver at another port a perishable cargo."

A somewhat similar question arose in *Frenkel* v. *MacAndrews & Co. Ltd.*,[3] where in the bill of lading issued at Malaga it was stated that the goods were shipped "in the steamship *Cervantes* "with destination to Liverpool, with liberty to touch at any "ports whatsoever although they may be outside the route, "without it being considered a deviation . . ." It was proved that the defendants' ships called in some cases (as in the case in question) on the outward voyage before proceeding up the east coast of Spain and in others on the return journey. In the former case the voyage of the vessel was advertised as "via "Levante"; in the latter case as "directo." The goods were in fact lost after leaving Malaga and proceeding via Levante.

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[1] [1893] A.C. 351.

[2] Ibid. 357.

[3] [1929] A.C. 545.

The House of Lords held that, in the absence of any express statement in the bill of lading of the ship's contract voyage, parol evidence was admissible to prove what the voyage was, and that in the circumstances the route via Levante was a usual commercial route for the ships to follow: accordingly no resort need be had to the liberty clause. Lord Sumner,[4] however, in distinguishing *Glynn* v. *Margetson*[5] as being a case where "the "termini of the bill of lading voyage were expressly stated," deduced from that case the principle that the two parts of the bill of lading, the described voyage and the liberty to deviate, must be read together and reconciled and that a liberty however generally worded could not frustrate but must be subordinate to the described voyage, adding[6] "that, if, as I suppose is the "case, parties may, if they can find apt words to do so, contract "themselves even out of *Glynn* v. *Margetson*[7] and make the "liberty to deviate control the terms of the described voyage, the "words used here—namely 'at any ports whatsoever, although "'they may be outside the route,' seem to go far, and possibly "far enough, to achieve this object." This opinion, as Branson J. observed in *Connolly Shaw Ltd.* v. *A/S Det Nordenfjeldske D/S*,[8] was not necessary to the decision of the case before the House but was nevertheless worthy of the greatest respect. In *Connolly's* case[8] the bill of lading acknowledged shipment of cases of lemons on board the vessel "now lying in the port of "Palermo and bound for London" and contained the following printed clause: "Nothing in this bill of lading (whether written "or printed) is to be read as an engagement that the said "carriage shall be performed directly or without delays, the "ship is to be at liberty, either before or after proceeding towards "the port of delivery of the said goods, to proceed to or return "to and stay at any ports or places whatsoever (although in a "contrary direction to or out of or beyond the route of the said "port of delivery) once or oftener in any order, backwards or "forwards, for loading or discharging cargo, passengers, coals "or stores, or for any purpose whatsoever, whether in relation to "her homeward voyage, or to her outward voyage, or to an "intermediate voyage, and all such ports, places and sailings "shall be deemed included within the intended voyage of the "said goods." It is legitimate to infer that the draftsman of this clause had been encouraged by the opinion of Lord Sumner above referred to. Nevertheless Branson J.[9] felt constrained to restrict the operation of the clause to such acts as would not frustrate "the object of the voyage, that is to say, the safe "carriage of the cargo, subject to the exceptions which are "provided by the bill of lading."

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[4] [1929] A.C. 545, 562.

[5] [1893] A.C. 351.

[6] [1929] A.C. 545, 564.

[7] [1893] A.C. 351.

[8] (1934) 49 Ll.L.Rep. 183, 188; 50 T.L.R. 418.

The only case to which I have been referred in which the destination of the ship was changed after the goods had been shipped is the decision of Bigham J. in *Hadji Ali Akbar & Sons Ltd.* v. *Anglo-Arabian and Persian S.S. Co. Ltd.*[10] In that case the bill of lading, after reciting the shipment of the goods on board the vessel and "bound subject to the liberties hereafter "mentioned, for London," provided by clause 16: "Should "the ship for any cause whatsoever not call at any port for "which the goods have been shipped, the owners of the ship "are at liberty to forward the goods from any port at which "they may call to their port of destination by any steamer or "steamers, either of their own or any other line." In fact, whilst the vessel was on passage, she was directed by her owners to Cardiff where the goods were transhipped to another vessel chartered by the defendants and delivered in London. Bigham J., holding that the shipowners were protected, said[11]: "No "doubt the object of the bill of lading contract is that the plaintiffs shall have their goods carried to London, and if the liberties "were of such a kind that if put into operation they would "defeat the object, it might be possible to disregard them in "construing the document."

With this guidance I now approach the question of the construction of the particular bills of lading with which I am concerned. It is plain that the main object and intent of the contract is the carriage of the timber to London or Hull, as the case may be. It is equally plain that this object and intent is frustrated if for any reason the shipowner purports to fulfil his contractual obligations by delivery elsewhere and in particular by delivery at a port in another country and disclaims any intention to complete delivery by forwarding the goods at his own expense to the contract destination. This object is none the less frustrated though the goods' owners themselves are free at their own expense to bring the goods undamaged to London. I am prepared to hold on the facts agreed that the shipowners were at common law justified under clause 14, paragraph (*c*), in discharging the cargo at Hamburg with a view to forwarding them to London at their own expense. But in my judgment paragraph (*f*) of that clause, which purports to provide that delivery at Hamburg "shall be deemed due fulfilment of the contract," is so inconsistent with and repugnant to the primary and unqualified promise to deliver at London that it must be rejected. This bill of lading does not, in my judgment, provide for alternative ports of discharge.

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[9] 49 Ll.L.Rep. 183, 191.

[10] (1906) 11 Com Cas. 219; 22 T.L.R. 600.

[11] 11 Com.Cas. 219, 226.

It was strongly urged by Mr. Roche that the adoption of this conclusion would have the result that delivery at a port other than the named port of discharge pursuant to the Chamber of Shipping War Clauses would also be a breach of contract. I prefer to express no concluded opinion upon this question as it does not strictly arise; but it may well be that by appropriate language qualifying the obligation to deliver at the named port—possibly in the manner in which these clauses are referred to in the bill of lading before me—this result could be avoided, or that different considerations might arise in relation to a type of clause in which national interests rather than the private interest of the shipowner are predominant.

The conclusion at which I have arrived is sufficient to decide the issue of liability in favour of the plaintiffs; but in view of the elaborate arguments that I have heard on the effect of the Act and Rules it is probably desirable that I should express my view on some at least of the points argued. For the purpose of this part of my judgment the assumption must be that (contrary to the view I have formed) under the bill of lading as properly construed at common law discharge at Hamburg amounted to due performance of the contract by reason of clause 14, paragraphs (*c*) and (*f*).

Two points have to be distinguished: (1) the act of taking the goods to Hamburg which may or may not have been a wrongful deviation under the Rules; and (2) the act of delivery at Hamburg in purported performance of the contract which may or may not have been a wrongful delivery under the Rules. But inasmuch as the defendants must fail unless the latter point is decided in their favour it is sufficient that I should confine my judgment to this latter point.

The Act and Rules nowhere in express terms deal with the place of delivery. It is, however, argued on behalf of the plaintiffs that the obligation to deliver at the proper port is covered by article III, r. 2, by the words "Subject to the provisions of "article IV the carrier shall properly and carefully load, handle, "stow, carry, keep, care for and discharge the goods carried." For the shipowner it was argued that the words "properly and "carefully" relate only to the manner and method of carriage, for example, the carriage of perishable cargo in a refrigerated hold and at proper temperatures. That they include such matter is not disputed; but do they not go further? In *Gosse Millard* v. *Canadian Government Merchant Marine Ltd.*[12] Wright J.[13] expressed the view that "the words 'properly discharge' in Art. "III, r. 2, mean, I think, '. . . deliver from the ship's tackle in "'the same apparent order and condition as on shipment,' unless "the carrier can excuse himself under Art. IV." In my judgment it is implicit in this that the discharge should take place at the proper port. The Act and Rules nowhere define what is the proper port, but I am satisfied that in this case Hamburg was not a proper port for two reasons. First, inasmuch as the right to discharge at Hamburg only arises if at all under clause 14, paragraph (*c*), the right so to discharge lapses if the effect of article III, r. 8, is to avoid that paragraph as a whole. In my judgment it has that effect. Paragraph (*c*) in terms would permit the shipowner to discharge the goods at the loading port in the circumstances stated in the paragraph and so claim full freight. I cannot believe that such a discharge would be a due compliance with article III, r. 2. There still remains, however, the question whether it is permissible in order to save the clause to use the blue pencil and delete only the offending provision. The words of article III, r. 8, "any clause, covenant "or agreement" are quite precise and do not, as I think, permit of any such process of revision in a case where the Act and Rules apply as a matter of law; and, where as in this case the Act and Rules apply as a matter of contract and the parties have not in the incorporation clause used language such as "if and to the "extent that any terms of this bill of lading are repugnant to or "inconsistent with the Act or Rules such term is to be void," I see no method of construction by means of which such process of revision can take place. In expressing this view I am conscious that I may be differing from the tentative view expressed by Pilcher J. in *Svenska Traktor Aktiebolaget* v. *Maritime Agencies (Southampton)*.[14] In that case, however, the incorporation clause (though not strictly relevant as the shipment in question was an outward shipment from the United Kingdom so that the Act and Rules applied as a matter of law) was different and the clause itself fell into two distinct parts and did not require substantial revision.

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[12] [1927] 2 K.B. 432; 44 T.L.R. 143.

[13] [1927] 2 K.B. 432, 434.

[14] [1953] 2 Q.B. 295, 301; [1953] 2 All E.R. 570.

Secondly (even if I am wrong in concluding that the whole paragraph is avoided if part is objectionable), I consider that the particular provision in paragraph (*c*), that in the circumstances stated in the paragraph the carrier shall be at liberty to discharge at any safe and convenient port other than the port of loading is itself avoided by article III, r. 8, as relieving the carrier from his obligation under article III, r. 2. As Wright J. observed in *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *P. & O. Steam Navigation Co.*,[15] "the Carriage of Goods by Sea Acts have "introduced a new and obligatory code of responsibilities and "immunities as affecting carriers under bills of lading in place "of the former rule that carriers by sea, while generally under "the liability of common carriers, were free by contract to vary "and limit their liabilities." The same judge, a few days earlier, had said in *Gosse Millard* v. *Canadian Government Merchant Marine Ltd.*[16]: "These Rules, which now have statutory force, "have radically changed the legal status of sea carriers under "bills of lading. According to the previous law, shipowners were "generally common carriers, or were liable to the obligations of "common carriers, but they were entitled to the utmost freedom "to restrict and limit their liabilities, which they did by elaborate "and mostly illegible exceptions and conditions. Under the Act "and the Rules, which cannot be varied in favour of the carrier by "any bill of lading, their liabilities are precisely determined, and "so also are their rights and immunities." Now inasmuch as article IV, r. 4, concerning deviation is one of the provisions to which article III, r. 2, is subject, it is reasonable to suppose that the legislature in providing certain permissible deviations had in mind that proper carriage and discharge involved proceeding to (subject to the permitted deviations) and discharging at a port of which it could be predicated that it was proper. In my judgment, taking the view that I do that as a matter of construction this bill of lading does not provide for alternative ports of discharge, the proper port implicitly assumed in article III, r. 2, on the facts of this case can only be London or Hull, as the case may be. Since there is nothing in article IV, r. 4, which permits discharge at any port to which the vessel may have deviated, I am satisfied that in so far as clause 14, paragraph (c), purports to permit discharge at Hamburg it is avoided by the Rules. In these circumstances I do not think that it would be useful or desirable that I should express any view as to the extent, if any, to which it is permissible under the Act and Rules to provide for alternative ports of discharge or for extensive definitions of the contract voyage.

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[15] [1927] 2 K.B. 456, 460; 43 T.L.R. 675.

[16] [1927] 2 K.B. 432, 434.

I accordingly determine the issue of liability in favour of the plaintiffs.

*Judgment for plaintiffs.*
*Damages to be assessed, if not agreed between the parties, by a special referee or Admiralty registrar.*

E. M. W.

The shipowners appealed.

*Eustace Roskill Q.C.*, *T. G. Roche Q.C.* and *A. Bateson* for the defendants. This appeal arises out of the London dock strike in the Autumn of 1954, and these proceedings are being watched by hundreds of shipowners and thousands of merchants. At the time when the *Caspiana* was diverted to Hamburg scores of other ships, bound to British ports, were likewise diverted. McNair J., although he found for the plaintiffs, held that on the facts the shipowners acted reasonably in what they did. That was not disputed. The case turns upon the construction of the bill of lading and of the Hague Rules as enacted in the Canadian Water Carriage of Goods Act, 1936, which in respect of the material articles is the same as the English Carriage of Goods by Sea Act. The defendants have to show (1) that they were entitled to proceed to Hamburg and discharge the cargo there, and (2) that they were entitled to their freight as if they had delivered the cargo in London or Hull. Clauses 14 (c) and 14 (f) must be read together. Everything turns upon that. On the authorities the master must act reasonably in relation to all parties, and the alternative port must be safe and convenient. It would be wrong to say that the master could discharge the cargo at the loading port under clause 14 (c) in any circumstances. He must act reasonably. This class of clause goes back for at least half-a-century and apparently has never before been contested. The true nature of the bargain agreed between the parties is that if it is impossible to deliver the cargo at a British port the ship is to deliver it at some other safe and convenient port. The judge held that clause 14 (*f*) was so inconsistent with, and so repugnant to, the primary and unqualified contract to deliver at London or Hull that it must be rejected.

[SINGLETON L.J. Does that mean that if you have a contract of carriage to a specified port the parties are not entitled to make a bargain of this kind?]

Yes! If the judge is right it is impossible to see how clause 14 (*a*) (referred to as the war clause) can survive. The question for this court is whether there is anything in this bill of lading, or in the Rules, which prevents effect being given to the ordinary principle that in construing a written instrument effect must be given to all its provisions. Sub-clauses (*c*) and (*f*) of clause 14 are not merely an excuse for failing to deliver at London or Hull, but they give a right to the shipowner to deliver at an alternative port. Every exception clause is inconsistent with the primary object of the charterparty, but that does not mean that it should be ignored and rejected as repugnant. It affords the shipowner a defence. The diversion of the ship to Hamburg was not deviation. Throughout shipping and insurance law a distinction has been recognized between going off the route between two specified ports and discharging at another convenient port under authorization by the contract. There is nothing in *Glynn* v. *Margetson*[1] which, to use Lord Sumner's words in *Frenkel* v. *MacAndrews & Co. Ltd.*,[2] "fetters all freedom of contract between shippers "and shipowners." It is no authority for the use made of it by McNair J. The contract must be looked at to ascertain its terms. Having regard to what happened it became a voyage from Vancouver to Hamburg and there was no deviation.

As to the Hague Rules, the defendants' broad submission is that they leave the parties completely free to fix whatever terminus to the voyage they agreed upon. If, therefore, on the true construction of the bill of lading, the parties had provided for a substitute port, there is nothing in the Rules which prevents effect being given to that bargain. The Hague Rules do not define the scope of the contract. They define the terms upon which the contract is to be performed, leaving the parties completely free to fix and define the scope of their contract. It is failure to realize that which has led the judge to his decision. Article III, r. 2, applies only to the method of loading, carrying and discharging goods, and not to the destination. Loss or damage in article III, r. 8, refers only to physical loss or damage

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[1] [1893] A.C. 351.

[2] [1929] A.C. 545, 562.

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G. H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama.

to cargo, and article IV, r. 4, is not a limitation clause. It gives a benefit to the shipowner.

If an exception clause is inconsistent with the primary object of the charterparty it does not mean that it is to be ignored or rejected as repugnant—it affords a defence to the shipowner. *Tillmanns & Co.* v. *Knutsford S.S. Ltd.*[3] is the first case in which such a clause as clause 14 was considered by the courts. The defendants in that case did not establish facts which would have brought the clause into play, but it was treated as permitting alternative discharge if the shipowner could get within the clause. In *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*[4] Greer J., referring to a similar clause, said: "That is an exception which "specifically provides that in certain events not only will the "owner of the ship be excused for any breach of contract in "delivering the goods, but it also provides for a substituted "method of performing the contract when these events happen."

McNair J. based his decision that clause 14 was repugnant on *Glynn* v. *Margetson*[5] and *Frenkel* v. *MacAndrews & Co. Ltd.*[6] Both were deviation cases. If the bill of lading on its true construction entitled the ship to go to Hamburg and there discharge the cargo it could not be deviation, for the ship was directly fulfilling the contract voyage. The plaintiffs can only defeat the shipowners' right to rely on clause 14 if they can bring the clause within article III, r. 8, of the Rules and therefore have it rejected as null and void. Article III, r. 8, deals with loss or damage to or in connexion with goods arising from negligence, fault or failure in duty. Clause 14 does not deal with physical loss or damage. It is said for the plaintiffs that the provision in clause 14 (*c*) which permits discharge at the port of loading in certain circumstances must be bad and that therefore the whole clause must be bad. It might in certain circumstances be reasonable to discharge at the port of loading. There is no difference from a case where the shipowner gets his freight in advance and the goods are lost on the voyage. If only the words "port of loading" offend, the shipowner is entitled to ask the court to delete those words.

[Reference was also made to *Kroll & Co.* v. *Silver Line Ltd.*[7]; *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[8]; *Dobell* v. *Rossmore S.S. Co.*[9]; *Joseph Constantine S.S. Line Ltd.* v.

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[3] [1908] 1 K.B. 185.
[4] (1920) 2 Ll.L.Rep. 639, 642.
[5] [1893] A.C. 351.
[6] [1929] A.C. 545.
[7] 1954 Amer.Mar.Cas. 177.
[8] [1954] 2 Q.B. 402; [1954] 2 All E.R. 158.
[9] [1895] 2 Q.B. 408.

*Imperial Smelting Corporation*[10]; and *Ronbar Enterprises Ltd.* v. *Green.*[11]]

*A. A. Mocatta Q.C.* and *R. A. MacCrindle* for the plaintiffs. There is nothing new in the arguments which have been addressed to the court on behalf of the defendants. Those arguments have been present to the minds of commercial lawyers whenever this sort of problem has arisen. Everyone has been aware that there is a skeleton in the cupboard with regard to deviation on liberty clauses. The present case is merely one of a long series from 1888. There is, it is submitted, no distinction in principle between the Hague Rules and the principles which have been applied in interpreting a deviation clause or what may be called a liberty clause. This particular variation of those clauses has never been decided in any English court in favour of the shipowner. Neither in *Tillmanns & Co.* v. *Knutsford S.S. Ltd.*[12] nor in *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*[13] was the shipowner successful.

Since 1924 the matter has been made more complicated by the Hague Rules and the legislation in various countries giving effect to those Rules. The point at issue is not a novel one to commercial lawyers. It is significant that the English reports contain no authorities showing that the question has been debated and decided in the courts; but it has been dealt with empirically by a system of give and take.

At common law the position is as follows: (1) the main object and intent of the bill of lading is the carriage of timber from Vancouver to London or Hull in consideration of the payment of an agreed freight, such freight to be paid in London, and no alternative port; (2) on principle and authority if the printed words of a bill of lading such as this conflict with the main object and intent of the contract they must be limited and if necessary disregarded, so as to give effect to and not defeat or frustrate that object and intent. That principle has been stated and applied in a long series of deviation cases. It is submitted that there is such a conflict here between the main object and intent of the bill of lading and sub-clauses (*c*) and (*f*) of clause 14 which are relied on by the shipowners.

Under the Water Carriage of Goods Act four alternative submissions are made by the plaintiffs. (1) Article III, r. 2, properly construed, provides that the shipowner does not properly carry and discharge goods unless he carries and discharges them at a proper port or is prevented from so doing by one of the many exceptions contained in the Rules themselves. No such exception is relied upon by these shipowners. Any other exception goes beyond the rights and immunities conferred upon the shipowner by the Rules. The shipowner's liabilities are lessened by clause 14 (*c*) and (*f*) and those sub-clauses are avoided by article III, r. 8, of the Rules. The proper port is London or Hull. (2) Clause 14 (*c*) would permit of final discharge at the port of loading and give the shipowner a right to full freight. That, it is submitted, is not carriage at all within the meaning of the Act and is avoided by article III, r. 8. Severance of the offending words in sub-clause (*c*) is not permissible under the Act. (3) Clause 14 (*c*) and (*f*) purport to allow a deviation by the ship which is not a reasonable deviation under article IV, r. 4, and is therefore not permitted by the Rules. Accordingly those sub-clauses are avoided by article III, r. 8. (4) If submission (3) is wrong and the true position in law is that if the right words are used the ship can finally discharge the goods other than at the named port, then, it is submitted, the bill of lading does not use the right words.

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[10] [1940] 1 K.B. 812; [1942] A.C. 175.

[11] [1954] 1 W.L.R. 815.

[12] [1908] 1 K.B. 185.

[13] 2 Ll.L.Rep. 639.

A bill of lading is a document of title. It is negotiable as a bill of exchange. It is a most important document in commercial trade and it is relied upon by buyers, sellers and bankers. If the construction for which the shipowners contend is accepted by this court, bankers and commercial people will look askance at bills of lading in future.

If sub-clauses (*c*) and (*f*) of clause 14 entitle the shipowners to complete the voyage at an alternative port or at the port of loading the consequences are going to be very far-reaching. If the shipowner wants to discharge the goods at other than the named port of destination he must use language which makes it clear that that is part of the main object and intent of the contract; otherwise he cannot rely on the contract. The judge was right in holding that the bill of lading did not provide for an alternative port of discharge. In *Leduc* v. *Ward* [14] it was held that when the parties have agreed upon the voyage and have written it in the bill of lading the definition of the voyage must cut down the general words to what was fairly applicable to the agreed and defined voyage. As a result of that decision those concerned began to expand the clause. There is no distinction between deviation in *Glynn* v. *Margetson* [15] and permission to go to Hamburg, as both exception clauses extend the main intention. In *Hadji Ali Akbar & Sons Ltd.* v. *Anglo-Arabian and Persian S.S. Co.*[16] Bigham J. was prepared to disregard a liberty clause if it conflicted with the primary object and intent, but he held that it did not. *Frenkel* v. *MacAndrews & Co.*[17] was not a case upon the true construction of the liberty clause. *Hain S.S. Co.* v. *Tate & Lyle* [18] is the leading case on the subject of deviation. In *Connolly Shaw Ltd.* v. *A/S. Det Nordenfjeldske D/S.*[19] Branson J. emphasized the necessity of looking at the whole contract.

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[14] (1888) 20 Q.B.D. 475.

[15] [1892] 1 Q.B. 337; [1893] A.C. 351.

[Singleton L.J. If under an agreement goods had to be carried to Manchester, which provided that if, owing to a strike, they had to be taken to Liverpool and there discharged, would that be a good contract?]

The answer must depend upon whether, looking at the whole contract, you could say it was. There is nothing unreasonable, if a ship cannot go to the named port, in her going to another port, but she is not entitled to leave the shipper to pay the transhipment freight. The shipowner is the carrier and he should be responsible for sending the goods on.

[Singleton L.J. If it is known that there are frequent strikes in this country affecting the docks, what is wrong in a shipowner saying: "I will carry your goods to London on condition that "if there is trouble in London I have liberty to deliver them "elsewhere." Where is the repugnancy?]

The repugnancy is that the shipowner says that having delivered the goods elsewhere he will have completed his contract and the shipper must pay for the transhipment. The final discharge at Hamburg does defeat the purpose of the contract. The shipowners rely on *Tillmanns & Co.* v. *Knutsford S.S. Ltd.*,[20] but it is submitted that it is of no assistance to the court. *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*[21] also failed on the facts, and the point now raised was not argued.

As to the Hague Rules, article III, r. 2, provides that the carrier shall, inter alia, "properly and carefully" carry and discharge the goods. The word "properly" is used in addition to the word "carefully," and shows that this provision is concerned with more than the degree of care with which these operations are effected. The carrier does not properly discharge unless he discharges at the proper port. The Rules adequately protect shipowners by laying down a long series of exceptions in article IV, r. 2, to which the duties imposed by article III, r. 2, are subject. These exceptions are not confined to the case of physical loss or damage. It is submitted, therefore, that the Water Carriage of Goods Act lays down the only exceptions upon which shipowners can rely. The type of clause here relied upon is in effect an exceptions clause, and was so regarded by Greer J. in *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*[21] It seeks to go beyond the list of permitted exceptions, and is therefore avoided by article III, r. 8. If the doctrine of *Glynn* v. *Margetson* [22] applies, as it is submitted it does, *S.S. Istros* v. *F. W. Dahlstroem & Co.*[23] is of no avail. It is submitted that whether or not the plaintiffs were entitled to succeed under the common law they should succeed under the Hague Rules.

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[16] (1906) 11 Com.Cas. 219.

[17] [1929] A.C. 545.

[18] (1934) 39 Com.Cas. 259.

[19] (1934) 49 Ll.L.Rep. 183; 50 T.L.R. 418.

[20] [1908] 1 K.B. 185.

[21] 2 Ll.L.Rep. 639.

Even if the Rules permit the carrier to provide for a substitute place of discharge, there remains the obligation imposed by article III, r. 2, to *carry* to that place. The present clause purports to allow discharge at the loading port without any carriage at all. To that extent it is plainly bad, and article III, r. 8, does not permit the carrier to sever the clause so as to rely upon the remainder of it. Alternatively, if article III, r. 8, permits severance, the form of the present clause is not such that part of it can be effectively severed; it is to this extent different from the material clause in *Svenska Tractor Akt.* v. *Maritime Agencies (Southampton)*,[24] which fell into two distinct parts.

It is also submitted that the carrier is not permitted to rely upon clauses purporting to give a wider liberty to deviate than that contained in article IV, r. 4. The Rules were intended by their framers to be a uniform code within which shipowners might operate. In this connexion reliance is placed upon the first of the three views considered by Scrutton on Charterparties, 16th ed. (1955), at pp. 488, 489.

[Singleton L.J. intimated that the court did not consider it necessary to consider that argument.]

*R. A. MacCrindle* following. If the court is not prepared to reject the offending words of clause 14 (*c*) and (*f*) it is submitted that the deviation cases require them to be construed restrictively and against the shipowners if this can be done. The shipowners rely upon the delay caused by the strike as invoking (*c*) and (*f*), but do not contend, and have not pleaded, that the delay was of

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[21] 2 Ll.L.Rep. 639.

[22] [1893] A.C. 351.

[23] [1931] 1 K.B. 247.

[24] [1953] 2 Q.B. 295; [1953] 2 All E.R. 570.

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a sufficiently serious nature to frustrate the contract. The bills of lading all provide that the shipowners are to carry the goods to the named port "or so near thereunto as the vessel may safely "get." The latter words excuse the ship from going to the named port if, inter alia, to do so would subject her to delay of an unreasonably lengthy duration. A mere temporary delay does not suffice: *Dahl* v. *Nelson.*[25] Thus, the shipowners cannot rely upon supervening delay as bringing into operation the true alternative obligation implicit in these words unless the delay is of the requisite serious character. Still less can they rely upon clause 14 (*c*) and (*f*), which are not in the nature of alternative obligations. It is submitted that the word "delay" in clause 14 (*c*) must be construed as meaning "delay of a sufficiently "drastic nature as to render any subsequent attempt at perform-"ance in effect performance of a different contract." So read the provision is in perfect harmony with the main object of the contract, but the shipowners are not in a position to rely upon it. If words like "any ports in any order" are deemed not to embrace ports the calling at which would be incompatible with the contract's main object, by the same token the word "delay" here should relate only to such delay as is incompatible with the fulfilment of the main object. In this connexion one purpose of clause 14 is to give guidance to shipowners faced with a delay of this sort after the contract is partially executed. It becomes their duty as bailees to act reasonably, and this shows what the parties envisage as being reasonable.

*Eustace Roskill Q.C.* replied.

[The following cases were also referred to: *Holland Colombo Trading Society* v. *Alawdeen*[26]; *Court Line Ltd.* v. *Dant & Russell Inc.*[27]; *Firestone Tyre & Rubber Co.* v. *Vokins*[28]; *Varnish & Co.* v. *Kheti (Owners)*[29]; *Temple S.S. Co.* v. *V/O Sovfracht.*[30]

SINGLETON L.J. This is an appeal from a judgment of McNair J. given on October 7. The case is one of importance, and, we were given to understand, one of some urgency; so that it is better that we should give judgment forthwith.

The defendants are a company carrying on business in the State of Panama, and they are the owners of the steamship *Caspiana*. The plaintiffs were indorsees of four bills of lading relating to the shipment of timber at ports in British Columbia for delivery at London or, in one case, at Hull. The bills of lading provided for carriage of the goods to London (or Hull) "or so "near thereunto as the vessel may safely get." The dispute between the parties arises on clause 14 of the bills of lading.

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[25] (1879) 12 Ch.D. 568; (1881) 6 App.Cas. 38.

[26] [1954] 2 Lloyd's Rep. 45.

[27] [1939] 3 All E.R. 314.

[28] [1951] 1 Lloyd's Rep. 32.

[29] (1949) 82 Ll.L.Rep. 525.

[30] (1945) 79 Ll.L.Rep. 1.

[His Lordship read the agreed statement of facts, summarized above, and continued:] The plaintiffs brought this action against the defendants claiming damages in respect of the expense to which they had been put by the defendants' failure to deliver the goods at the port of London (or Hull). McNair J. held that the plaintiffs were entitled to recover and gave judgment for them, with damages to be assessed. The defendants appeal.

In the court of first instance, and on appeal, the defendants relied upon clause 14 (*c*) and (*f*) of the bills of lading, and it was submitted on their behalf that they had carried out the terms of their contract, and that they were entitled to judgment in the action. The case put forward on behalf of the plaintiffs is that clause 14 (*c*) and (*f*) should be disregarded on one, or both, of two grounds: (1) Under the common law: The main object of the bills of lading is to provide for the carriage of timber to London in consideration of an agreed freight. It is said that on principle and on authority, if the printed words conflict with the main object and intent of the contract they must be limited and, if necessary, disregarded so as to give effect to, and not to defeat, that object and intent; and, further, that there is such a conflict in the present case if the printed sub-clauses (*c*) and (*f*) are taken together. (2) Under the Water Carriage of Goods Act, 1936, of the Dominion of Canada: The Hague Rules apply and form part of the contracts. The plaintiffs claim that in failing to deliver the goods at London (or Hull) the defendants were in breach of article III, r. 2, which provides that the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. They say that a clause which allows final discharge of the goods at the port of shipment and gives the shipowner the right to full payment is not carriage within the Act, and is avoided by article III, r. 8; that the sub-clauses purport to allow a deviation which is not a reasonable deviation under article IV, r. 4, and consequently they are avoided by article III, r. 8.

The submission made under the Hague Rules applies only to the goods covered by three of the bills of lading; in the other case the goods were carried as deck cargo. Each of the bills of lading is on the form of the Anglo-Canadian Shipping Co. Ltd. of

Vancouver. I was not able to discover how long this form has been in use. I refer to the first of the bills of lading. They are all in the same form except for the fact that one is in respect of cargo carried on deck. On the face of the first of the bills of lading appears: "Shipped at Vancouver, British Columbia, in "apparent good order and condition, weight, measure, marks, "numbers, contents and value unknown, by A. Sereth Lumber "Co. Ltd. on board the good vessel called the *Caspiana* for "carriage to"—in type, "London, England"; in print, "or so "near thereunto as the vessel may safely get always afloat, the "following goods: 1333 pieces Douglas Fir Lumber . . . loaded "on board S.S. *Caspiana*, 'Subject to Chamber of Shipping War "'Risks, Clauses Nos. 1 and 2'"—again typed; and, in print, "which are to be delivered in the like good order and condition "at the aforesaid port unto"—in type, "order of shipper. "Notify Lloyd Duncan & Co. Ltd. 56 Moorgate"—in print, "or "his or their assigns, he or they paying freight plus other "charges incurred in accordance with the provisions contained in "this bill of lading. Freight"—in type, "Collect at destination." The amount of the freight is stated, and below, again in print, there appears: "In accepting this bill of lading the "merchant expressly accepts and agrees to all its stipulations, "whether written, printed, stamped or otherwise incorporated, as "fully as if they were all signed by the merchant." On the other part of the bill of lading, that which has been spoken of as the back of it, there are the following clauses, I, II and III: "I. Definition. Wherever the term 'merchant' is used in this "bill of lading, it shall be deemed to include the shipper, the "receiver, the consignee, the holder of the bill of lading and the "owner of the cargo. II. Paramount Clause. The Hague Rules "contained in the International Convention for the unification "of certain rules relating to bills of lading, dated Brussels, "August 25, 1924, as enacted in the country of shipment shall "apply to this contract. When no such enactment is in force "in the country of shipment, the corresponding legislation of the "country of destination shall apply, but in respect of shipments "to which no such enactments are compulsorily applicable, the "terms of the said Convention shall apply. With respect to "goods loaded at a Canadian port, the Water Carriage of Goods "Act, 1936, of the Dominion of Canada, shall be effective. With "respect to goods loaded at a United States port, the Carriage "of Goods by Sea Act, of the United States, approved April 16, "1936, shall be effective. III. Jurisdiction. Any dispute arising "under this bill of lading shall be decided in the country where "the carrier has his principal place of business, and the law of "such country shall apply."

The carrier has his place of business in Panama. It is agreed for the purposes of this case that there is no difference between the law of this country and the law of the State of Panama.

There follow in the bill of lading 16 clauses of stipulations or conditions. Clause 3 covers "Forwarding, substitute of vessel, "through cargo and transhipment." Clause 14 is the one of importance. It is headed: "Government directions, War, "Epidemics, Ice, Strikes, etc."

[His Lordship read clause 14, including sub-clauses (*c*) and (*f*) of the bill of lading, and continued:] In support of the submission on the common law, Mr. Mocatta cited *Leduc* v. *Ward*.[1] I do not read the report as it is sufficiently referred to in the next case Mr. Mocatta cited: *Margetson* v. *Glynn*.[2] The following facts are set out in the report: "the action was brought by "shippers of oranges against the shipowners, claiming damages "for breach of the contract contained in the bill of lading by "reason of which the oranges were damaged. The bill of lading "stated that the goods were shipped on board the steamship "*Zeta*, 'now lying in the port of Malaga, bound for Liverpool, "'with liberty to proceed to and stay at any port or ports, in "'any rotation, in the Mediterranean, Levant, Black Sea, or "'Adriatic, or on the coasts of Africa, Spain, Portugal, France, "'Great Britain and Ireland, for the purpose of delivering "'coals, cargo, or passengers, or for any other purpose whatso-"'ever.' The oranges were shipped at Malaga, and the ship then, "instead of going to Liverpool direct, went first to the port of "Burriana, which is on the north-east coast of Spain, and then "back again, and proceeded to Liverpool. A delay of some days "was thus caused, and the consequence was that the oranges "when they arrived at Liverpool were in a rotten condition. The "defendants justified the delay by the terms of the bill of lading. "The learned judge held that the general words in the bill of "lading did not authorize such a deviation from the direct voyage "from Malaga to Liverpool, and gave judgment for the plaintiffs."

On appeal to the Court of Appeal, Lord Esher M.R. said[3]: "I think we ought to construe this bill of lading according to the "principle of construction which was laid down in *Leduc* v.

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[1] (1888) 20 Q.B.D. 475; 4 T.L.R. 313.

[2] [1892] 1 Q.B. 337.

[3] Ibid.

" *Ward*,[4] a decision which I not only think we are bound to " follow but which I think was right. We have to construe a " well-known description of contract—a contract contained in a " bill of lading. A bill of lading is a contract for the carriage of " goods on board a ship, and the first thing which the shipper and " the shipowner must agree upon is the voyage. As was said in " *Leduc* v. *Ward*, the object of the shipper is to have his goods " carried from one place to another, in order that when they " reach the place of destination they may be either sold or used. " The object of the shipowner is to carry the goods from the " one place to the other; and upon the voyage on which he is " to carry them depends the freight—that is the charge which " he can properly make for carrying them. If he is to carry " the goods 500 miles, he will charge one freight; if he is to carry " them 2,000 miles, it is absurd to suppose that he will not charge " a great deal more. Therefore, the first thing which is always " settled between a shipowner and a shipper of goods is the " voyage. And, after the hundreds of years during which bills " of lading have existed, we know the mode in which the voyage " is generally described—namely, as from 'the port in which " 'the ship is now lying,' or at which the goods are to be shipped, " to another port which is named. It is generally, but not " always, from the port in which the ship is lying, because there " may be a charterparty providing that the ship shall go to " another port and there ship the goods. In such a case the " whole charterparty voyage would include the port at which " the goods were not to be shipped; but, when the bill of lading " is given only after the goods are shipped, and when it would " be improperly given before, the voyage must be from the port " in which the ship is then lying to the port of destination, and " that is the voyage described. In the present case, the words " of the bill of lading are, 'now lying in the port of Malaga, and " 'bound for Liverpool.' The voyage described is from Malaga " to Liverpool, and, if there were nothing else in the bill of " lading, the ship would be bound to go from Malaga to Liverpool, " according to the ordinary sea course for a steamer from the " former port to the latter, and she would not be entitled to stop " or to call at any other port, although it was in that course; " she would be bound to go straight. But here, after describing " the voyage, liberty is given to do something. What is that " liberty? It is a liberty with regard to that voyage. It is " not liberty to go another voyage, but liberty to do something

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[4] 20 Q.B.D. 475.

"with regard to that voyage which the ship could not do if the "bill of lading had stopped at the words 'from Malaga to "'Liverpool.'"

Later in his judgment, the Master of the Rolls said: "Is "there a reasonable and fair construction which will not only "give a meaning to those words but will also give a meaning "to the primary words which describe the voyage? When you "are describing a voyage, and you add with regard to that "voyage liberty to do something, would it be a reasonable "construction to say, it means that you may go an absolutely "different voyage? I think not. I think we must put a limitation on the words (not exactly the same), but analogous to that "which has been put on similar words in other cases, and we "must say that the meaning is, with liberty to proceed to and "stay at those of the places named, which, as was said in "*Leduc* v. *Ward*,[4] are substantially on the course of the voyage "named and agreed upon, and hold that the words do not enable "the shipowners to go upon that which is in substance another "and an absolutely different voyage. The voyage agreed on was "from Malaga to Liverpool. The ship went straight away from "the direct course to Liverpool; she went in the opposite direction to Burriana, and Mr. Bigham was obliged to admit that "his argument, if well founded, would equally allow the ship to "go to Constantinople, then into the Black Sea to Sebastopol, "and thence round the coast of Africa to Liverpool." The appeal was dismissed.

Bowen L.J. said[5]: "But, so soon as the parties have agreed "upon the voyage, and have written that in, the definition of the "voyage must, as a matter of business, cut down the general "words to what is fairly applicable to the voyage which has "been agreed upon and defined. Any other construction would "make business impossible. It would make it impossible to "insure the cargo. It would make it impossible for the consignees of the cargo to know what to do as to taking delivery, "or what to do with the bills of lading. It is impossible to "suppose that the general words are not to receive a light and a "limitation from the definition of the voyage which is the very "object of the contract."

Fry L.J. said[6]: "When the court in dealing with a contract "or document of any kind finds that difficulty, it always, so far "as I know, follows this principle, that the general words must

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[4] 20 Q.B.D. 475.
[5] [1892] 1 Q.B. 337, 343.
[6] Ibid. 344.

"be limited so that they shall be consistent with and shall not "defeat the main object of the contracting parties."

It is not very clear from the report of that case how much was in print and how much was typed or written into the bill of lading. I think, however, it does become fairly clear when the speeches in the House of Lords are examined; and in order to make it clear counsel looked up the House of Lords record.

The record does not show which words were written and which were in print, but a footnote (m) at p. 302 of the 16th ed. of Scrutton on Charterparties states that the words "now lying at "Malaga and bound for Liverpool" were in writing. The bill of lading contained this clause (as appears from the record): "In "case of blockade or interdict of the port of discharge, or if "without such blockade or interdict, the entering of the port of "discharge should be considered unsafe by reason of war or "disturbance, the master to have the option of landing the goods "at any other port which he may consider safe at shipper's risk "and expense, and on the goods being placed in charge of any "mercantile agent or of the British consul, and a letter being "put in to the post office addressed to the shipper and consignee "if named, stating the landing and with whom deposited, the "goods to be at the shipper's risk and expense, and the master "and owners discharged from all responsibility. With liberty in "the event of the said steamer putting back to Liverpool, or into "any other port or otherwise, being prevented from proceeding "in the ordinary course of her voyage, to tranship the goods by "any other steamer at receiver's risk and expense."

When *Margetson* v. *Glynn*[7] reached the House of Lords, the judgments given in the Court of Appeal were expressly approved. Lord Herschell L.C. said[8]: "I do not put that before your "Lordships as by any means the governing consideration, because "I am led to the conclusion at which I have arrived upon the "same grounds as those which have been so very clearly and "fully expressed by the learned judges in the court below. I "find myself so completely in agreement with the reasons which "they have given that I do not think it necessary to trouble "your Lordships with any further observation."

Lord Halsbury said[9]: "My Lords, I am entirely of the same "opinion. It seems to me that in construing this document, "which is a contract of carriage between the parties, one must "in the first instance look at the whole of the instrument and

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[7] [1893] A.C. 351.

[8] Ibid. 356.

[9] Ibid. 357.

"not at one part of it only. Looking at the whole of the instrument, and seeing what one must regard, for a reason which I "will give in a moment, as its main purpose, one must reject "words, indeed whole provisions, if they are inconsistent with "what one assumes to be the main purpose of the contract. The "main purpose of the contract was to take on board at one port "and to deliver at another port a perishable cargo. I do not "think the learned counsel who argued this case on the part of "the appellants gave sufficient effect in the argument which he "addressed to your Lordships to the difference between the "ordinary and formal parts of the document which are to be "found in print and the written parts—indeed I gathered from "him at one time that he rather contested the legitimacy of "considering the difference whether the words were in print or "in writing; he appeared to intimate that that doubt was justified "by the terms of this particular document, because that in the "ordinary construction of a commercial document such a principle as I have mentioned has been adopted certainly for "something like a century cannot be a matter of doubt, and the "reason for it appears to me to be very cogent and relevant to "the case before your Lordships.

"I have in my hand the report of a case in the Court of "King's Bench in the year 1803, *Robertson* v. *French*,[10] in "which Lord Ellenborough, as it appears to me, gives with great "precision the ground upon which one part of a document may "be relied upon as controlling and cutting down the generality "of the words in the other. His Lordship says: 'In the course "'of the argument it seems to have been assumed that some "'peculiar rules of construction apply to the terms of a policy "'of assurance which are not equally applicable to the terms of "'other instruments and in all other cases. It is therefore "'proper to state upon this head that the same rule of con"'struction which applies to all other instruments applies "'equally to this instrument of a policy of insurance, namely, "'that it is to be construed according to its sense and meaning "'as collected in the first place from the terms used in it, which "'terms are themselves to be understood in their plain, ordinary "'and popular sense unless they have generally in respect to "'the subject-matter, as by the known usage of trade or the like, "'acquired a peculiar sense distinct from the popular sense of "'the same words, or unless the context evidently points out "'that they must, in the particular instance and in order to

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[10] (1803) 4 East 130, 135.

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“ ‘ effectuate the immediate intention of the parties to that
“ ‘ contract, be understood in some other special and peculiar
“ ‘ sense. The only difference between policies of assurance and
“ ‘ other instruments in this respect is that the greater part of
“ ‘ the printed language of them being invariable and uniform
“ ‘ has acquired from use and practice a known and definite
“ ‘ meaning, and that the words superadded in writing (subject
“ ‘ indeed always to be governed in point of construction by the
“ ‘ language and terms with which they are accompanied), are
“ ‘ entitled nevertheless, if there should be any reasonable doubt
“ ‘ upon the sense and meaning of the whole, to have a greater
“ ‘ effect attributed to them than to the printed words, inasmuch
“ ‘ as the written words are the immediate language and terms
“ ‘ selected by the parties themselves for the expression of their
“ ‘ meaning, and the printed words are a general formality
“ ‘ adapted equally to their case and that of all other contracting
“ ‘ parties upon similar occasions and subjects.’ ” The House of Lords, as I have said, upheld the judgment of the Court of Appeal.

The result of these decisions is that one must consider the particular contract into which the parties have entered, and if there be some printed condition which would defeat the object and intention of the parties to the contract it should be limited or disregarded, and this applies especially in the case of perishable goods.

A somewhat similar question came before Branson J. in *Connolly Shaw Ltd.* v. *A/S. Det Nordenfjeldske D/S.*[11] I do not think it necessary that I should read the judgment. There are passages which are especially useful. He emphasized the necessity of looking at the whole of the contract. Apart from this principle, I do not feel that the authorities to which we were referred help towards the solution of the question now before the court. I do not regard the sub-clauses in the case before us as giving liberty to deviate in the ordinary understanding of that expression. It is rather a substituted method of performing the contract, if that on which the parties have agreed appears to be virtually impossible in the way intended. If there had been no clause such as clause 14 (*c*) a state of uncertainty would have existed and the vessel would have been held up. It was to avoid that position arising that a substituted place of discharge of the goods was inserted and made part of the contract; and it must be remembered that the master was under a duty to act reasonably. It is unlikely that the cargo, or any part of it, would be discharged at the port of loading, though that might be the most convenient place if the trouble occurred at or near that port; and, again, it might be best for the merchant if the goods were perishable. And it is only on the happening of one of the events specified in clause 14 (*c*) that any question arises.

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[11] (1934) 49 Ll.L.Rep. 183, 186, 190; 50 T.L.R. 418.

McNair J. accepted the submission of the plaintiffs on this part of the case. He said[12]: "With this guidance I now "approach the question of the construction of the particular bills "of lading with which I am concerned. It is plain that the main "object and intent of the contract is the carriage of the timber "to London or Hull, as the case may be. It is equally plain "that this object and intent is frustrated if for any reason "the shipowner purports to fulfil his contractual obligations by "delivery elsewhere and in particular by delivery at a port in "another country and disclaims any intention to complete "delivery by forwarding the goods at his own expense to the "contract destination. This object is none the less frustrated "though the goodsowners themselves are free at their own "expense to bring the goods undamaged to London. I am "prepared to hold on the facts agreed that the shipowners were "at common law justified under clause 14, paragraph (*c*), in "discharging the cargo at Hamburg with a view to forwarding "them to London at their own expense. But in my judgment "paragraph (*f*) of that clause, which purports to provide that "delivery at Hamburg 'shall be deemed due fulfilment of the "'contract' is so inconsistent with and repugnant to the primary "and unqualified promise to deliver at London that it must be "rejected. This bill of lading does not, in my judgment, provide "for alternative ports of discharge."

I am unable to accept this view. It was open to the parties to agree upon an alternative place of delivery if it appeared impossible, through strikes, etc., to discharge the goods at the port which was their first choice, and there was no reason why they should not agree that in such an event the master should discharge the goods at a safe and convenient port. The judge said[13]: "I hold that if under the bills of lading the defen- "dants were in law entitled in any event to discharge their "contractual obligations by delivery in Hamburg, the existing "strike situation was at all material times such that the defen- "dants could not be said to have acted unreasonably in deciding

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[12] Ante, p. 474.

[13] Ante, p. 470.

"to deliver both the London and the Hull cargo at Hamburg." I do not regard clause 14 (*c*), coupled with 14 (*f*), as repugnant to the object of the contract. It is an agreed method of performance should the position envisaged by clause 14 (*c*) arise.

The clause is not a novel one. There has been something of the kind over many years. One case in which this is shown is *Tillmanns & Co.* v. *Knutsford S.S. Ltd.*[14] The clause reads: "Should a port be inaccessible on account of ice, blockade or "interdict, or should entry and discharge at a port be deemed "by the master unsafe in consequence of war, disturbance or "any other cause, it shall be competent for the master to "discharge goods intended for such port on the ice or at some "other safe port or place, at the risk and expense of the shippers, "consignees or owners of the goods; and upon such discharge "the ship's responsibility shall cease." The defendants in that case did not establish facts to bring the clause into play, and there was no argument upon it.

In the Court of Appeal[15] there were references to the clause in the judgments of Vaughan Williams and Kennedy L.JJ. Vaughan Williams L.J. said: "I now come to the question of "the construction of clause 4 of the charterparty. This clause "deals with two possible events, on the happening of either of "which it is competent for the master to discharge goods "intended for Vladivostock either upon the ice or at some other "safe port or place at the risk and expense of the shippers, consignees or owners of the goods, and upon such discharge the "shipowners' responsibility is to cease." Kennedy L.J., having said that the inaccessibility was not proved, and that the judge was right as to that, continued: "I now come to what is "to my mind the difficult point in the case. We have to "construe clause 4, which runs: 'Should a port be inaccessible "'on account of ice, blockade or interdict, or should entry and "'discharge at a port be deemed by the master unsafe in "'consequence of war, disturbance or any other cause, it shall "'be competent for the master to discharge,'" and so on. No question was raised as to the validity of the clause. Obviously it did not occur to anyone that the clause was repugnant. One only needs to look at the names of counsel engaged in that case, as well as the firms of solicitors who were instructing counsel, in order to realize that if any such point had been considered worthy of argument it would have been raised then.

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[14] [1908] 1 K.B. 185, 186.

[15] [1908] 2 K.B. 385, 395, 408.

Further, in *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*,[16] there came before Greer J. a case concerning a bill of lading which had this clause upon it: "In case of the . . . interdict "of the port of discharge . . . the master may land the goods "and so complete his contract at the nearest safe and convenient "port at the expense and risk of the owners of the goods." Greer J., speaking of that clause, said[17]: "Now, two clauses "were originally relied on by the shipowners, one on the face "of the bill of lading and one on the back. The first reads: "'In the case of blockade or interdict of the port of discharge, "'or, if the entering and discharging in the port shall be con"'sidered by the Master unsafe by reason of war or disturbance "'. . . the Master may land the goods and complete the contract "'at the nearest safe and convenient port at the expense and "'risk of the owners of the goods.'" He continued: "That "is an exception which specifically provides that in certain "events not only will the owner of the ship be excused for "any breach of contract in delivering the goods, but it also "provides for a substituted method of performing the contract "when these events happen. If the events which happened in "the present case were within that clause, it would be quite "clear the shipowners would be entitled to full freight on "delivery of the goods in Glasgow." I do not think it necessary to read more of the judgment, or to go into the facts in that case. There, again, no one suggested that the clause which I have read was repugnant to the contract of carriage. The words used by Greer J. can be applied to this case, though I am not sure that it is right to speak of the clause as an exception. The vessel went to Hamburg, which was found to be a convenient port, if the defendants' contention on the law is correct. In so doing she was going out of her way, and she was acting in accordance with the agreement. Under clause 14 (*f*) that which she did is to be regarded as performance of the contract of carriage.

I now come to the point raised under the Hague Rules. This appears to me to depend upon the construction of article III, r. 2, which reads: "Subject to the provisions of article IV "the carrier shall properly and carefully load, handle, stow, "carry, keep, care for and discharge the goods carried." In my opinion this cannot be read as covering a duty to discharge at the destination agreed upon. The duty imposed by this article is to load, to stow, and to discharge the goods carried properly

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[16] (1920) 2 Ll.L.Rep. 639.

[17] Ibid. 642.

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and carefully. That involves doing each of the tasks in a proper manner and with reasonable care. I refer to the text in French, which is set out in Scrutton on Charterparties, 16th ed., p. 568. The word "properly" in the rule I have read is the translation of the words "de façon apropriée." The port of discharge is written or typed on the bill of lading itself, whereon is recorded the agreement as to the place to which the goods are to be carried, and that is not within the scope of article III, r. 2.

On this point McNair J. said[18]: "For the shipowner it was "argued that the words 'properly and carefully' relate only to "the manner and method of carriage, for example, the carriage "of perishable cargo in a refrigerated hold and at proper "temperatures. That they include such matter is not disputed; "but do they not go further? In *Gosse Millard* v. *Canadian* "*Government Merchant Marine Ltd.*[19] Wright J. expressed the "view that 'the words "properly discharge" in article III, r. 2, "'mean, I think, deliver from the ship's tackle in the same "'apparent "order and condition as on shipment" unless the "'carrier can excuse himself under Article IV.'" The judge added: "In my judgment it is implicit in this that the discharge "should take place at the proper port. The Act and rules no-"where define what is the proper port, but I am satisfied that in "this case Hamburg was not a proper port for two reasons. First, "inasmuch as the right to discharge at Hamburg only arises "if at all under clause 14, paragraph (*c*), the right so to discharge "lapses if the effect of article III, r. 8, is to avoid that para-"graph as a whole. In my judgment it has that effect. Para-"graph (*c*) in terms would permit the shipowner to discharge "the goods at the loading port in the circumstances stated in "the paragraph and so claim full freight. I cannot believe that "such a discharge would be a due compliance with article III, "r. 2."

I cannot accept the sentence: "In my judgment it is implicit "in this that the discharge should take place at the proper port." There is no need to imply any such term. Nor do the words of article III, r. 2, taken in their ordinary meaning, require it. There is nothing in the rules to prevent parties agreeing upon a substituted port of discharge. The bills of lading on their face state the place, and a stipulation (clause 14 (*c*)) provides for some other place in the event of one of the causes, foreseen

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[18] Ante, p. 476.

[19] [1927] 2 K.B. 432, 434; 44 T.L.R. 143.

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as a possibility, arising. In such a case the agreement of the parties avoids the need for any implication.

I draw attention to the words of Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*,[20] in which, dealing with the case before him, he said: "There is, however, a third "interpretation to article III, r. 2. The phrase 'shall properly "'and carefully load' may mean that the carrier shall load and "that he shall do it properly and carefully; or that he shall do "whatever loading he does properly and carefully. The former "interpretation perhaps fits the language more closely, but the "latter may be more consistent with the object of the rules. "Their object as it is put, I think, correctly in Carver's Carriage "of Goods by Sea, 9th ed. (1952), p. 186, is to define not the "scope of the contract service but the terms on which that "service is to be performed. The extent to which the carrier "has to undertake the loading of the vessel may depend not "only upon different systems of law but upon the custom and "practice of the port and the nature of the cargo. It is difficult "to believe that the rules were intended to impose a universal "rigidity in this respect, or to deny freedom of contract to the "carrier. The carrier is practically bound to play some part "in the loading and discharging, so that both operations are "naturally included in those covered by the contract of carriage. "But I see no reason why the rules should not leave the parties "free to determine by their own contract the part which each "has to play. On this view the whole contract of carriage is "subject to the rules, but the extent to which loading and "discharging are brought within the carrier's obligations is left "to the parties themselves to decide."

I cannot see that there is anything in the Act or in the rules which avoids the right of the parties to agree upon a substituted method of performance in the event of a strike or strikes which brought about the position which existed when the vessel approached the port of London. And I feel bound to say that I cannot believe that the Convention of 1924, which led to the rules, would have agreed that the parties to such a contract should be deprived of the right to determine a substituted place of discharge should there be difficulties of the kind mentioned in clause 14 (*c*) at the intended port of discharge. In the absence of any such provision, what would have been the position? The vessel would have had to wait; questions as to frustration would have arisen: a state of uncertainty would have existed. It is no answer to say that under article IV, r. 2, the owners of the vessel would have been relieved from liability. Their ship is of value to them. Moreover, it may be of great advantage to the merchant to have his goods delivered at a convenient port—and sometimes perhaps at the port of loading—especially if they are perishable goods. It could seldom happen that the goods would be discharged at the port of loading; the master must always act reasonably.

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[20] [1954] 2 Q.B. 402, 417, 418; [1954] 2 All E.R. 158.

Mr. Mocatta submitted that clause 14 (*c*) and clause 14 (*f*), read together, were in conflict with the Rules, in that if the discharge took place at the port of loading it was not carriage under the Act. That may be answered by the definition of "carriage of goods" in Article I (*e*). Mr. Roskill's reply is that in any event there is nothing in the Rules to prevent the parties agreeing upon the place or places of discharge.

The next point raised by Mr. Mocatta was that under article IV, r. 4, a reasonable deviation is not to be deemed to be an infringement of the Rules, and that that which took place went beyond a reasonable deviation. I am not sure that the submission is right on the facts having regard to the findings; but apart entirely from that, I do not consider that the discharge at Hamburg ought to be regarded as something done under a liberty to deviate. The discharge at Hamburg came about because of difficulties of a kind envisaged by clause 14 (*c*) under which a substituted place of delivery was agreed upon. There was no deviation as that expression is normally understood; nor can it be said that in this respect any question arises under article III, r. 8.

Mr. MacCrindle submitted that if the words in clause 14 (*c*) cannot be disregarded they should be restricted, and that it must be shown by the defendants that there was likely to be a delay of so serious a character as to render delivery thereafter delivery under a different contract. No such question was raised before the trial judge. It appears to me that such a consideration would defeat the purpose for which the clause was inserted.

Our attention was called to the position of bankers and indorsees of bills of lading. It is sufficient to draw attention to the clear words at the foot of the face of the bills. So far as I know it has not been argued in the courts until now that a clause of the nature of clause 14 (*c*), coupled with clause 14 (*f*), is bad, or that it ought to be treated as null and void. We were referred to a decision in the United States District Court, Northern District of California, Southern Division, a case of *Kroll & Co.*

v. *Silver Line Ltd.*,[21] and to the judgment of Michael J. Roche C.J. The clause with which the Chief Justice was dealing is not fully set out, and there is force in Mr. Mocatta's criticism that we ought not to pay attention to it without full information as to what was before the court; but so far as it goes it is at least satisfactory for me to know that the judgment of the Chief Justice is in accordance with the view which I have formed upon this case.

I will cite one passage from the judgment of Sir George Jessel M.R. in *Printing and Numerical Registering Co.* v. *Sampson*,[22] a different type of case: "It must not be forgotten "that you are not to extend arbitrarily those rules which say "that a given contract is void as being against public policy, "because if there is one thing which more than another public "policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that "their contracts when entered into freely and voluntarily shall "be held sacred and shall be enforced by courts of justice. "Therefore, you have this paramount public policy to consider— "that you are not lightly to interfere with this freedom of "contract."

In my opinion the appeal of the defendants should be allowed and judgment should be entered for them.

JENKINS L.J. I agree. McNair J. decided in favour of the plaintiffs on two grounds. He held, first, that, apart from the rules scheduled to the Canadian Water Carriage of Goods Act, 1936 (which may conveniently be referred to as "The Hague "Rules"), clause 14 (*f*) of the printed conditions of the four bills of lading, which purported to provide that delivery at (in the events which happened) Hamburg pursuant to clause 14 (*c*) should be deemed due fulfilment of the contract, was so inconsistent with and repugnant to the primary and unqualified promise to deliver at London (or, I may add, Hull) that it must be rejected. He held, secondly, that if (contrary to his view) discharge at Hamburg amounted to due performance of the contract as properly construed at common law, by virtue of clause 14 (*c*) and (*f*) of the printed conditions, these provisions were avoided by the Hague Rules, which admittedly apply to three of the four bills of lading (i.e., those other than the one comprising deck cargo) as a matter of contract, by force of the "Paramount Clause" (clause II) of the printed conditions.

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[21] 1954 Amer.Mar.Cas. 177.

[22] (1875) L.R. 19 Eq. 462, 465.

In support of the first of these two grounds, Mr. Mocatta, for the plaintiffs, relies on a recognized principle, which is not confined to bills of lading, but in its relation to bills of lading may be stated as being that where a bill of lading is concluded by means of a printed form comprising general conditions, into which the parties write, type, or otherwise incorporate the terms agreed upon in respect of the particular transaction in view (for example, the termini of the voyage contracted for), and any of the printed conditions is found to be inconsistent with or repugnant to the main object and intention of the bill of lading as disclosed by the terms specially agreed, the court will limit or modify the conflicting printed condition to the extent necessary to enable effect to be given to such main object and intention, or in a case of complete repugnancy wholly reject it.

Mr. Mocatta referred us to several cases in which this principle has been applied to restrict printed deviation clauses expressed in terms so wide that if full and literal effect was given to them they would enable the shipowners at their own will and pleasure to delay indefinitely, and thus for all practical purposes defeat, the main, and indeed essential, object and intention of the particular bargain, namely, the carriage of the shippers' goods from one specified port to another. Inasmuch as the principle, as distinct from its application to the present case, is not in dispute, I need not take up time by referring at length to this considerable line of authority, and will merely mention as typical examples *Leduc* v. *Ward*[23] and *Glynn* v. *Margetson*.[24]

But before the principle relied on by Mr. Mocatta can be called in aid, the printed general condition of which modification or rejection is sought must be shown to be repugnant to or inconsistent with the main object and intention of the particular bargain. It is here, as I think, that Mr. Mocatta's argument on this part of the case breaks down. He says that sub-clauses (*c*) and (*f*) of clause 14 of the printed conditions now under consideration, in purported pursuance of which the timber was discharged at Hamburg, are just as inconsistent with or repugnant to the main object and intention of the bills of lading, namely, the carriage of the timber from Vancouver or Nanaimo to London or Hull, as the wide liberties to deviate were inconsistent with or repugnant to the voyages contracted for in the cases I have mentioned. I cannot agree. It seems to me that there is a material difference between a deviation clause purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as those contained in clause 14 (*c*) and (*f*) in the present case, which are applicable and operative only in the event of the occurrence of certain specified emergencies. The distinction is between a power given to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or impede the performance of the contract in accordance with its primary terms.

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[23] 20 Q.B.D. 475.

[24] [1892] 1 Q.B. 337; [1893] A.C. 351.

It is true that the provisions of sub-clauses (*c*) and (*f*) of clause 14 qualify in certain specified events the primary obligation of the shipowners to carry the timber to and discharge it at London or Hull. But it is not to be supposed that every qualification upon the primary obligation of a shipowner introduced by printed general conditions incorporated in a bill of lading involves a repugnancy to or inconsistency with the particular bargain embodied in it, and is therefore to be re-formed or disregarded. If that were so the greater part of all the printed general conditions incorporated in any bill of lading based on a printed form would be made waste paper, notwithstanding that the parties had deliberately made them part of their contract.

The principle on which Mr. Mocatta relies is not to be invoked for the purpose of creating inconsistencies or repugnancies which would not have existed if the whole bargain, general and special conditions alike, had been written out in full for the purposes of the particular transaction. If clause 14 in the present case had been struck out of the print and written in identical terms on the face of each of the bills it would, so far as I can see, have involved no inconsistency with or repugnancy to the primary obligation of the shipowners to carry the timber to London or Hull. It would merely have been a provision, accepted by both parties, to meet circumstances beyond the control of either in which the shipowners could not reasonably be expected to carry out the contract in its primary form. What the rights and obligations of the parties should be upon the supervening of one or other of the emergencies dealt with by clause 14 would have been purely a matter of bargain, and it would have been idle for the plaintiffs to attack the validity of the provisions agreed merely upon the ground that such provisions were disadvantageous to them. Why should the result be different because clause 14 in fact appears as one of the printed general conditions? Prima facie the plaintiffs or their predecessors in title must be taken to have agreed to all the terms and conditions of the bill, both special and general, and I fail to see why, if they would have been bound by the terms of clause 14 had they been written out afresh on the face of the bill, they should not be equally bound by them appearing as they do amongst the printed general conditions. There is no question here of mistake, or non est factum, or rectification.

In the deviation cases the court had ample ground for concluding that the parties, having agreed to a particular voyage, could not have intended that the wide power of deviation allowed to the shipowners by the general conditions should apply to its full extent, for that would mean in effect that the shipowners need never perform the contract voyage at all. But I do not see how the court could possibly conclude in the present case that the parties to the bills now under consideration, having agreed upon the voyage from Vancouver or Nanaimo to London or Hull, could not have intended clause 14 (*c*) and (*f*) to take effect in accordance with their terms so as to entitle the shipowners, in the event (for instance) of a strike at London or Hull making discharge of the timber at the named port impracticable, to discharge it at the port of loading or any other safe and convenient port, and on doing so to charge the full freight. The judge appears to have been much impressed by the power to discharge at the port of loading and to have thought that this at least must be repugnant. I cannot accede to that view. As I have said, it seems to me that if it was open to the parties validly to agree to special provisions to meet special emergencies such as those contemplated by clause 14, the nature of these special provisions was purely a matter of bargain.

The principle relied on by Mr. Mocatta is a principle of construction, which no doubt makes it easier for the court in construing a bill of lading to correct or resolve a repugnancy or inconsistency between a special condition and a printed general condition than it would be to correct or resolve a similar repugnancy or inconsistency between two comparable clauses in a bill the whole of which had been specially written out for the purposes of the particular transaction in view. But where the two clauses are such that they could sensibly and without contradiction stand together as clauses in an agreement specially

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written out for the occasion, there can in my view be no warrant for remodelling or rejecting one of them merely because (being a printed general condition) it introduces some qualification upon the other (being a special term of the particular bargain). Even in the deviation cases the court allowed the general conditions as to deviation to qualify to some extent the obligation of the shipowner to perform the particular voyage agreed upon.

The validity of clauses comparable to 14 (*c*) and (*f*) in the present case was assumed in *Tillmanns & Co.* v. *Knutsford S.S. Ltd.*[25] and *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*,[26] and in the latter case Greer J. said: "If the events which "happened in the present case were within that clause, it would "be quite clear the shipowners would be entitled to full freight "on delivery of the goods in Glasgow." This observation was no doubt made obiter. Nevertheless it is entitled to respect; and I think that if such clauses were indeed invalid it would be remarkable that during all the years they have been in use their validity has never before been attacked in any reported case so far as the researches of counsel have enabled them to discover. Mr. MacCrindle, appearing with Mr. Mocatta for the plaintiffs, suggested that clause 14 (*c*) should, as a matter of construction, be confined to cases of delay so inordinate as in effect to prevent discharge at London or Hull except under what would virtually amount to a new contract, and that no such degree of delay was here made out. I see no justification for this limited construction of clause 14 (*c*), and in any case the point not having been taken below the facts necessary for its determination were not adequately found or agreed. For these reasons I hold that the first of the two grounds on which the judge based his conclusion cannot be supported.

As to the other ground, namely, that the disputed provisions are void as infringing the Hague Rules, I can find nothing in these rules that imposes any stipulation as to the termini of any given voyage, and it seems to me necessarily to follow that they leave the parties free to make any bargain they please in that regard. The parties could thus at their option specify one particular port as the terminus ad quem, or one or more alternative ports at the shipowners' option, or any port selected by the shipowners on a particular stretch of coast-line, or (to come nearer to the present case) a particular port with power to the shipowners or the master to substitute another port selected by

[25] [1908] 1 K.B. 185; C.A. [1908] 2 K.B. 385.

[26] 2 Ll.L.Rep. 639, 642.

them or him in certain events. Mr. Mocatta relies on article III, r. 2, which provides: " Subject to the provisions of article IV, " the carrier shall properly and carefully load, handle, stow, " carry, keep, care for and discharge the goods carried." He says that " properly . . . discharge the goods carried " means " conduct the operation of discharging the goods carried in a " proper manner and at the proper place," and that " properly " . . . carry . . . the goods carried " means " carry the goods in a " proper manner on the proper voyage." I think the language of this rule is apt to refer, and does refer, to the proper conduct of the operations of discharging, carrying, etc., rather than to the place at which or voyage on which those operations are to be conducted. But, if I am wrong in this, then the propriety in a geographical sense of the operations in question must depend upon the terms of the contract, and the carrying or discharging of the goods is properly conducted in a geographical sense if they are carried to and discharged at the port to and at which they ought to be carried and discharged according to the terms of the contract.

It follows, in my opinion, that sub-clauses (*c*) and (*f*) of clause 14 of the printed conditions in the present case involve no breach of article III, r. 2, and consequently are not avoided by the invalidating provision of the rules, namely, article III, r. 8, even though clause 14 (*c*) authorizes, in the events therein mentioned, discharge at the port of loading; for, on the assumption that the place is material, discharge at the port of loading is in those events proper by the terms of the contract so far as the place of discharge is concerned, and there is nothing in clause 14 (*c*) to absolve the shipowners from their obligation to discharge the goods properly in other respects.

Mr. Mocatta also relied on article IV, r. 4, which provides: " Any deviation in saving or attempting to save life or property " at sea, or any reasonable deviation shall not be deemed to be an " infringement or breach of these rules or of the contract of " carriage, and the carrier shall not be liable for any loss or " damage resulting therefrom." The argument here is that article IV, r. 4, by expressly permitting certain deviations impliedly prohibits others, and that clause 14 (*c*) of the printed conditions in the present bills of lading authorizes deviations beyond those permitted by rule 4. I cannot accept this argument. I think that rule 4 should be construed merely as giving an additional protection to shipowners and not as imposing by implication an additional restriction in an article expressed to

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relate to "rights and immunities." It may have been inserted ex abundanti cautela to ensure that shipowners should not be deprived of any of the immunities given by the article by reason of any deviation of the kinds mentioned in rule 4. But if I am wrong in this, I do not think that what is authorized by clause 14 (*c*) is a deviation. It is a power in certain events to substitute as the port of discharge some other port (which may be the port of loading) for the port of discharge named in the bill of lading. That is a change of terminus, not a deviation from the normal route to the terminus originally fixed, and, as appears from what I have already said, I find nothing in the rules that prohibits such a change of terminus.

It is noteworthy that Mr. Mocatta was constrained to admit that if he was right, clause 14 (*a*) and (*b*) as to war risks and the like must share in the same condemnation as 14 (*c*) and (*f*), though it so happened in the present case that 14 (*a*) and (*b*) were in substance replaced by the special incorporation of the Chamber of Shipping War Risks Clauses Nos. 1 and 2 on the face of the bill. I find it unnecessary to express any view on Mr. Roskill's submission on the defendants' side that "loss or "damage to or in connexion with goods" in article III, r. 8, is confined to physical damage, as this seems to me a somewhat doubtful question, and I think the defendants are entitled to succeed on the other arguments to which I have referred.

For the reasons I have stated, I think that the second ground for the judge's decision in favour of the plaintiffs fails with the first, and, accordingly, that this appeal should be allowed.

Hodson L.J. I also agree. The four bills of lading in question provide that in the events which have happened, that is to say, strikes at London and Hull, the master might discharge the cargo at port of loading or any other safe and convenient port, and that this discharge should be deemed due fulfilment of the contract. There is no question but that Hamburg, where the discharge took place, was a safe and convenient port. The plaintiffs contend that this provision, while permitting discharge at Hamburg, does not absolve the defendants from performance of their contract, the main object of which was to carry the cargo from Vancouver or Nanaimo to London or Hull, in consideration of freight. It is said that, there being a conflict between the main object of the contract and the liberty or exception clause, this latter clause must, if necessary, be disregarded so as to give effect to and not to defeat the main object of the contract. Bigham J. in *Hadji Ali Akbar & Sons Ltd.* v. *Anglo-Arabian and Persian S.S. Co.*[27] used this language: "No doubt "the object of the bill of lading contract is that the plaintiffs shall "have their goods carried to London, and if the liberties were of "such a kind that if put into operation they would defeat the "object, it might be possible to disregard them in construing the "document."

No doubt if the liberty clause were such as to render the promise to carry the cargo wholly illusory, it would be so repugnant to the main object that it must be disregarded, but this provision was, on the face of it, a sensible arrangement to cover, inter alia, what is not an uncommon difficulty in the performance of shipping contracts, namely, that caused by strikes at the ports where goods are loaded or unloaded. In the absence of such a clause questions of difficulty would obviously arise as to what decision the master should take on being faced with a strike in one or other of these ports. Apart from authority, I should have no difficulty in reaching the conclusion that the clause in question provides that there should, in the events which have happened, be an alternative port of discharge to London or Hull, and that no principle of the common law prevents such a construction being adopted. As Wright J. said in *S.S. Istros* v. *F. W. Dahlstroem & Co.*[28]: "In one sense, every exception clause "is pro tanto inconsistent with the primary or express obligations "which at law or by contract rest upon an owner or a master in "respect of the goods entrusted to his charge and the duties "arising under a charterparty, but, notwithstanding those obligations, exceptions clauses must receive in due course, if their "language and the circumstances require it, their appropriate "effect as a shield to a claim for damages."

The question is one of construction, and no authority has been cited which directly supports the contention of the plaintiffs. On the contrary, the authorities point the other way. Clauses of the same character as this have been in existence for many years. In *Glynn* v. *Margetson*[29] (to which I shall return) the bill of lading, which must have been dated at least as early as 1892, contained such a clause, as the Record of the House of Lords shows. The clause has already been read. In *Tillmanns & Co.* v. *Knutsford S.S. Ltd.*[30] the voyage was from London to Vladivostock and the clause in that case was of a similar kind, contained under the heading "Conditions and exceptions" in the bill of lading. The material part of that has also already been read, and I will not repeat it; but I quote the observations of Channell J.: "In order "to justify delivery at another port the circumstances must be "within the words 'should entry and discharge at a port be "'deemed by the master unsafe.'" In the Court of Appeal all the members of the court referred to the clause, by way of citation, without expressing any opinion about it, but certainly throwing no doubt upon its validity.

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[27] (1906) 11 Com.Cas. 219; 22 T.L.R. 600, 601.

[28] [1931] 1 K.B. 247, 252; 36 Com. Cas. 65.

[29] [1892] 1 Q.B. 337.

[30] [1908] 1 K.B. 185, 193.

A most definite expression of opinion on such a clause was expressed by Greer J. in the *Mongaldai Tea Co.* case.[31] The bill of lading in that case provided for the carriage of goods from Calcutta to London, and the ship had discharged her cargo not at London but at Glasgow. Greer J. said[31]: "That is an exception which specifically provides that in certain events not only "will the owner of the ship be excused for any breach of contract "in delivering the goods, but it also provides for a substituted "method of performing the contract when these events happen. "If the events which happened in the present case were within "that clause, it would be quite clear the shipowners would be "entitled to full freight on delivery of the goods in Glasgow." That is a very strong expression, although the judge dealt with the matter before him on another ground, for the shipowners were found on the facts not to be within the exception. Indeed, in both the *Tillmann* case and the *Mongaldai* case it was held that the shipowners were not covered by the exceptions clauses, but the point that the clauses were bad was never raised by the experienced counsel who were engaged.

It is said, however, on the authority of the House of Lords in *Glynn* v. *Margetson*,[32] that the result contended for by the plaintiffs follows as a matter of law. I find, however, nothing in that case to compel me to that conclusion. It was a case which turned on the construction of a deviation clause which had to be read with the main object of the voyage, namely, the carriage of oranges from Malaga to Liverpool. To quote from Lord Sumner's speech in *Frenkel* v. *MacAndrews & Co.*[33]: "It would have been enough for the decision to have said "'Malaga to Liverpool is not Malaga to Burriana and back to "'Liverpool.'"

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[31] 2 Ll.L.Rep. 639, 642.

[32] [1893] A.C. 351.

[33] [1929] A.C. 545, 563; 45 T.L.R. 311.

The principle of construction upon which this decision is based is not confined to bills of lading. In the same case in the Court of Appeal Fry L.J.[34] set out the general principle to which reference has already been made. I would only say that I do not find that this principle has any application to this case, for here the primary obligation to deliver in London is, in my view, qualified by the liberty to discharge at a safe and convenient port if the shipowner becomes entitled thereto.

Commenting on *Glynn* v. *Margetson*, Lord Sumner in *Frenkel's* case[35] pointed out that the judgments in that case were directed to the case in hand and were not intended to lay down a general rule to fetter all freedom of contract between shippers and shipowners. It is one thing, in my opinion, to construe general words in a deviation clause as subordinate to the main object of the voyage—that is to say, the carriage of oranges from Malaga to Liverpool—and accordingly to prevent the whole purpose of the contract being defeated; it is another thing to say that the parties are not free to contract for an alternative port of discharge in certain circumstances, and to provide for this to be deemed fulfilment of their contract. The latter is what I think the parties have agreed to here; and I am not deterred from recognition of that agreement by the argument advanced by Mr. Mocatta that the bill of lading being a document of title handled by bankers and commercial people will in future be looked at askance if the construction for which the shipowners here contend is accepted. Due regard must, of course, be paid to that which is on the face of the document; but it is to be remembered that on the face of the document (albeit printed) there appear these words: "In accepting this bill of lading the "merchant expressly accepts and agrees to all its stipulations "whether written, printed, stamped or otherwise incorporated as "fully as if they were all signed by the merchant."

Mr. MacCrindle, who followed Mr. Mocatta, advanced an alternative argument as follows: he asked the court, if not prepared to go the whole way with him and his clients, to give what have been described as the peccant words a restrictive construction, noting that the owners had invoked delay, and on the face of the bills of lading their obligation was to carry to London or so near thereto as the vessel might safely get. He argued that the word "delay," which appears in clause 14 (*c*) of the bill of lading, means delay of such a serious and extensive character as to render the performance of this contract at London after the delay the performance of a substantially different contract. He stated that if the delay was so great as to amount to a frustration of the contract the shipowners need not wait until the end of the crisis, but he insisted that the word "delay" must be construed strictly against the shipowners, upon the analogy of the deviation cases, and urged that nothing had been done in this case by the shipowners to discharge the burden of proving the delay. One answer to that, I think, is that the facts of this case as agreed are really not such as to leave the argument open. It has been assumed on the facts as agreed that either the clause came into operation or it did not, and that there was no half-way house. I think it would be necessary, in order to consider this argument fully, that evidence should be called which would enable it to be properly dealt with.

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[34] [1892] 1 Q.B. 344.

[35] [1929] A.C. 545, 562.

Further than that, I am bound to say that I think the words of clause 14 (*c*) and (*f*) are clear, and that this argument would in any case have failed, for the same reasons as have been given in answer to the main argument advanced by the cargo owners. Moreover, a clause open to attack in that way would be quite futile from the shipowners' point of view and would not be of any use as part of the contract.

As to the Hague Rules, which apply to three of the four bills of lading, I accept the submission of the shipowners as to the proper construction of article III, r. 2; that is to say, that the words "properly and carefully" relate to the manner and method of carriage and do not carry the implication that the discharge must take place at the port which is named in the bill of lading as the primary destination. This is consistent with what appears to be the object of the rules, and I agree also with the statement which appears in Carver's Carriage of Goods by Sea, 9th ed. (1952), p. 186, that the object of the rules is to define not the scope of the contract of service, but the terms on which that service is to be performed. Article IV, r. 4, is not, I think, inconsistent with this view, if it is read, as I think it should be, as preserving the rights of the shipowners given by rule 2 of the same article, which might otherwise be open to question but for the provisions of rule 4. I do not regard article IV, r. 4, as otherwise applicable to this case, since I do not think that what has happened here comes under the heading of "Deviation"; the bill of lading in truth provides for a substituted port of discharge, and the shipowners have availed themselves of a liberty to discharge at an alternative port and not of a liberty to deviate. Looking at the whole contract, the

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voyage to Hamburg was not a deviation but a direct fulfilment of the contract voyage; and I think, as Mr. Roskill submitted, that there is a valid distinction between going off the route and going to a different port. It is accordingly unnecessary to express an opinion as to the meaning of the words in article III, r. 8: "loss or damage in connexion with the goods."

Our attention has been drawn to the dictum of Atkinson J. in *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corporation*,[36] where he expressed an opinion that these words only refer to damages for injury to goods; and also to the observations of Lord Maugham in the House of Lords in the same case,[37] where he appeared to accept Atkinson J.'s observations; but neither of those expressions of opinion was necessary for the decision in that case, and the matter, therefore, is open to argument.

*Appeal allowed.*
*Leave to appeal to House of Lords.*

Solicitors: *Richards, Butler & Co.; William A. Crump & Son.*

A. W. G.

[36] [1940] 1 K.B. 812.

[37] [1942] A.C. 154, 175; 57 T.L.R. 485; [1941] 2 All E.R. 165.

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## WALSH *v.* NATIONAL COAL BOARD.

[1955 W. 733.]

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*Nov.* 2, 3, 4.

Evershed M.R., Birkett and Romer L.JJ.

*Mines and Minerals — Coal — Statutory duty — Roof and sides — "To "make roof and sides of . . . working place secure"—New working place—Workman injured by fall of stone—"Repair"—Duty of employers to men engaged in providing secure roof and sides—Coal Mines Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 102 (8).

*"Working place" — "Reasonably practicable" to avoid breach of statutory duty. "Repair."*

By the Coal Mines Act, 1911, s. 49: "The roof and sides of "every . . . working place shall be made secure, and a person "shall not, unless appointed for the purpose of exploring or "repairing, travel on or work in any . . . working place which is "not so made secure."

The plaintiff was injured by a stone which fell on him while he was working in a mine owned by the National Coal Board. At the time of the accident the plaintiff, who was employed as a lipper, was one of a party engaged in enlarging and constructing the working roadhead to the coal face after shots had been fired to rip down the roof. The plaintiff's job was to clear the debris and to pack it into the side of the roadhead. The stone which fell on him had been spragged up by the charge hand and another workman after an unsuccessful attempt had been made to dislodge it:—

*Held*, (1) that the board were not guilty of a breach of statutory duty because the absolute duty imposed on them by section 49 of of the Coal Mines Act, 1911, did not apply to persons engaged in performing the obligation laid on employers by that section of providing a safe roof and sides.

Dictum of Lord Asquith of Bishopstone in *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663; [1953] 2 All E.R. 478 applied.

*Per* Evershed M.R. The work being performed by the plaintiff was "repair" of a "working place" within the meaning of section 49.

(2) That for the purpose of deciding whether it was not reasonably practicable to avoid or prevent a breach of statutory duty, the relevant time was when a decision to deal with a danger was taken. At the relevant time the charge hand had adopted the only method which was reasonably open to him in accordance with ordinary mining practice, and he had performed it sufficiently and efficiently, and that, therefore, if the board had committed a breach of the duty imposed by section 49, they would have been excused from civil liability by section 102 (8).

Dictum of Lord Reid in *Marshall* v. *Gotham Co. Ltd.* [1954] A.C. 360, 373; [1954] 1 All E.R. 937 applied.

Decision of Stable J. affirmed.

APPEAL from Stable J.

The plaintiff, Patrick Joseph Walsh, was employed as a miner by the defendants, the National Coal Board, at the Merrylees pit, Desford, in the county of Leicestershire. On July 1, 1952, he was working as a lipper with other miners under the direction of a charge hand, John Golding. The party of miners were following up behind the coal face workmen, and were ripping a roadway to the face. The coal was being worked by longwall mining and each day the seam, which was about five and a half feet thick, was worked out to a depth of several feet over a long stretch of the face, leaving the upper nine inches of the seam to help to support the roof. As the face advanced the travelling road had to be extended through the newly worked area and the roof had to be raised from about four feet nine inches under the cut to about nine feet, which was the average height of the travelling road. The road was brought down by shot firing, and the plaintiff's job was to clear away the loose debris after the shots had been fired and to pack it into the space on each side of the roadhead where the coal had been excavated. This space was known as the packhole. The packed material formed part of the support of the sides of the road and, therefore, of the roof, and the packing also constituted a convenient means of getting rid of the loose material and making the road fit for use. The roof and sides were further supported by girders and arches which were built up as the roadhead advanced.

At the time of the accident the plaintiff was clearing away rubble which had been brought down by shot firing. The shot firing was done by one Fraser, who was the deputy of the district and whose job was concerned with the safety of the men and of the place where they worked. After the shot firing a stone or boulder of considerable size, weighing about one or two tons, was observed embedded about four feet six inches up at the side of the lip of the excavated seam. The charge hand prised at the boulder with a crowbar to see whether he could dislodge it, but he found that he could not move it and so he decided to sprag it up, that is, to drive in a piece of timber prop or sprag and to wedge the sprag so as to support the stone and to keep it securely in place and prevent it from falling. The charge hand and another miner, one Merriman, fixed the sprag. The plaintiff's evidence as to what happened between that time and the time when the stone fell was not accepted at the trial. He said that he told the charge hand that the boulder ought to be brought down and that subsequently the stone had shifted its position and rested against a girder, and that he had then again said that it ought to be brought down. The stone eventually fell on the plaintiff and inflicted on him a slight spinal injury in the lumbar region.

On June 30, 1953, the plaintiff issued a writ against the board and the charge hand alleging that the defendants had committed a breach of both their statutory and their common law duty to him. The statement of claim was delivered on July 16, 1954. The charge against the second defendant was dropped before the matter came for trial. The board denied negligence or that they were in breach of any statutory duty. At the hearing Stable J. dismissed both claims. As to the injury, the medical evidence given at the trial was that, although the plaintiff had not returned to work since the accident and complained of pain at the bottom of his back, around the right hip, and discomfort in the right leg; his trouble was not so much due to the physical injury which he had sustained but to traumatic neurasthenia.

The plaintiff appealed.

*F. S. Laskey* and *J. D. F. Moylan* for the plaintiff. Section 49 of the Coal Mines Act, 1911,[1] imposes an absolute duty on the employer to make every travelling road and working place secure: *Edwards* v. *National Coal Board*,[2] and if part of such a place collapses, that of itself indicates that there has been a breach of the duty and puts the onus of proving the contrary on the employer. He cannot discharge that onus by showing that the work was being done in accordance with proper mining practice. He must show that he chose a course which was safe, or that it was not reasonably practicable so to do: see section 102 (8).[3] If the normal mining practice falls short of the required standard, the employer must take further steps to discharge the statutory duty. It was said on behalf of the board that if this stone had been brought down, a dangerous cavity might have been left. That was a hypothetical danger; but the stone, which weighed one or more tons, was an obvious and, as the events showed, a real danger. The board relied on the protection afforded by section 102 (8), but they did not show that they took steps to obviate the real and present danger. If removal of that danger would have produced other dangers, then the board would have had to show that there was no reasonably practicable method of dealing with those hypothetical dangers before they could successfully invoke section 102 (8). The allegation that the plaintiff had pulled out a support, thus rendering the stone insecure, was not supported by the evidence.

By regulation 6 of the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.I. 1947, No. 973), the roof and sides have to be supported as specified by the manager in support rules,[4] but as the rules for this mine were never before the court it is conceded that no inference should be drawn whether the method of packing adopted was, or was not, that specified. [Reference was also made to regulations 6 (4), (5) and 13.]

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[1] Coal Mines Act, 1911, s. 49: "The roof and sides of every travelling road and working place shall be "made secure, and a person shall not, "unless appointed for the purpose of "exploring or repairing, travel on "or work in any travelling road or "working place which is not so made "secure."

[2] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[3] Coal Mines Act, 1911, s. 102: "(8) The owner of a mine shall not "be liable to an action for damages "as for breach of statutory duty in "respect of any contravention of or "non-compliance with any of the provisions of this Act if it is shown "that it was not reasonably practicable to avoid or prevent the breach."

[4] Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.I. 1947, No. 973), reg. 6: "(1) The roof "and wherever necessary the sides of "every roadhead shall be systematically and adequately supported by "setting supports, in addition to the "packs (if any), at such regular "intervals and in such manner as "is specified by the manager in the "support rules."

The judge said that the plaintiff was not within the scope of the duty imposed by section 49 because he was "appointed" to make this part of the road safe, that a person appointed to that task would necessarily be faced with the possibility of an accident happening to him before he had made the road safe, and that he could not maintain successfully that the board owed him a duty to make the road safe before he went there. "Appointed" has not been given any special meaning in the Act, but to come within the scope of the exclusion in section 49, an appointment would have to be made in writing by the mineowners, or at least by a definite act of appointment by the mine manager. The plaintiff was not shown to have been appointed to any particular work in connexion with the safety of the mine. If any person was appointed in the relevant sense it was probably the charge hand, whose duty it was to put the sprags into position.

Nor was the plaintiff "making" the roof and sides secure. He was working with the other miners shovelling away debris and packing the sides, and although the packing might at a later stage give some support against creep and subsidence, it was essentially merely a way of disposing of waste material. It was not a method of making the roof and sides secure, for they were supported before the packing was begun.

*Gerald Gardiner Q.C.* and *G. Swanwick* for the National Coal Board. Section 49 does not apply here, although it is conceded that the place where the accident occurred was probably a "working place." The duty imposed by the section is subject, by necessary implication, to an exception in the case of the men employed to make the place secure, for otherwise an employer would be unable legally to carry out the obligation imposed by the section. The court would shrink from a construction of a statute, particularly a penal provision such as this, which involves an absurdity. In *Turner* v. *National Coal Board*[5] Streatfeild J. rightly said that section 49 had no bearing on this type of case.

The plaintiff was "appointed" to do work of "exploring or "repairing." He was "appointed" in the sense that he was sent to do the job. [Counsel was stopped on this point.] In the court below it was not suggested that the plaintiff's work was not "exploring or repairing." He was bringing down the roof

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[5] December 8, 1954; not reported.

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and then repairing it: see *Stapley* v. *Gypsum Mines Ltd.*,[6] which turns on the analogous Metalliferous Mines General Regulations, 1938,[7] and see also *Wraith* v. *National Coal Board*.[8] The plaintiff was employed in "exploring or repairing" the roof and sides of this working place so that it could be used as a travelling road. "Exploring or repairing" is wider in meaning than "making" secure. The plaintiff, as one of the gang of rippers, had to investigate, or "explore," the safety of the place in order to see what needed doing, and then had to pack the sides, thus making them secure.

Even if there was a breach of the duty imposed by section 49 (which is not admitted) the board would be absolved from liability by section 102 (8), for they did all that it was practicable for them to do to avoid the breach. The test is not whether it was reasonably practicable to avoid a man being injured, but whether at the time of the accident it was reasonably practicable to make the roof secure—the alleged breach being that of sending men to work in that place before the roof and sides had been made secure. The matter must be looked at as at the time when the accident occurred: see *Marshall* v. *Gotham Co. Ltd.*[9]; and the standpoint is that of a reasonable employer. It is legitimate to take account not only of the risks involved but also of the cost of taking the required steps—though the cost aspect does not arise here. This is not a case in which no precautions were taken. The employers had to balance one risk against another. The evidence was that shot firing might have made the roof insecure, and the board took what seemed to them to be the wisest course and the one which was in accord with recognized mining practice. The fact that an accident has occurred does not point unequivocally to the fact that the method adopted was ineffective or improperly carried out, for there were several possible causes of the accident —one was that the plaintiff might himself have dislodged the sprag. There was, however, no positive finding as to what caused the accident, so the plaintiff cannot claim that it was the method adopted by the board.

*J. D. F. Moylan* in reply. It is conceded that it is not necessary for the plaintiff to come within the exclusion in section 49 that he should have been "appointed" in writing, but the appointment must be clear, for the scheme of the Act is to ensure

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[6] [1953] A.C. 663; [1953] 2 All E.R. 478.

[7] (S.R. & O. 1938, No. 630, as amended by S.R. & O. 1945, No. 1351.)

[8] [1954] 1 W.L.R. 264; [1954] 1 All E.R. 231.

[9] [1954] A.C. 360; [1954] 1 All E.R. 937.

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that those working in the mine know definitely who has been appointed for safety purposes. Admittedly, the charge hand told the plaintiff what to do, but that was not an appointment in the sense required.

"Exploration" is not defined in the Act; it would probably include such things as investigation of the seam, but nothing that the plaintiff did or was directed to do could fairly be said to be "exploring." Nor was he doing "repairing." The men were making a new travelling road by extending the existing length of travelling road beyond the point to which it originally ran. Enlarging the undercut to make a new road is not repairing something previously secure which has become insecure, but is making something new. "Repair" is not defined in the Act, but in its ordinary sense it connotes putting something which was originally in a good condition, but which has deteriorated, back into a state of good repair. It was suggested that clearing up the debris brought down by shot firing might be "repair," but it is misleading to split the work on which the gang were engaged into stages and then to say that the whole task was one of repair. The plaintiff's particular job was to pack the debris into the part of the road which had already been made secure; he was not packing into the side of the new length. It is not necessary to give an extended meaning to "repair" beyond the ordinary meaning of the word, for in so far as an escape route from section 49 is needed, it is provided by section 102.

The gang were engaged, admittedly, on essential work, for the road had to be extended every day, but if this was not repair work the onus was on the employer to show that it was not reasonably practicable to avoid the breach of the statutory duty by having the men there before the roof and sides had been made secure. After the dangerous stone had been observed it was a breach of that duty to allow the plaintiff to work there any longer until the stone had been removed by a person or persons appointed to do work of repair.

"Travelling road" is not defined in the Act, but "road" and "roadhead" are defined in regulation 13.[10] This gang was working at or about the junction of the road and the roadhead.

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[10] Coal Mines (Support of Roof and Sides) General Regulations, 1947, reg. 13: "(1) 'road' means any part of "a passage which is maintained in "connexion with the working of the "mine, except that part which is "within ten yards of the face; 'road-"'head' means, in relation to a road "which leads to a face of a seam, all "that part of the mine between the "end of the road nearest the face and "that face and of the same width "throughout as that roadend."

The board have submitted that the absolute duty in section 49 is subject by necessary implication to an exception in the case of the men employed to make the place secure. It is obvious that the employer must send someone to make the place secure, but it is submitted that he can only do so within the limits imposed by section 102 (8). He must show that he took all necessary steps to avoid the breach. It is not necessary to make the implication in section 49 itself.

[*Gardiner Q.C.* intervening. Section 75 makes a breach of any section in Part II of the Act a criminal offence. Section 102 (8) only applies to a civil action for damages.]

Section 102 (3) covers that. The duty imposed by section 49 gives rise to criminal liability and in order to see whether the employer can escape liability one must look at section 102.

If it be assumed that section 49 applies, it is true that the judge made no finding as to why the stone fell, but that is immaterial, for the onus under section 102 is on the board. There was in fact a danger here and the roof was, in fact, not secure, for the stone did fall. The duty on the employer is to keep the place secure.

It was not disputed that it would have been practicable to have removed the stone either by shot firing or by levering it out. The question is whether it was reasonably practicable. The test is not good mining practice but whether it was reasonably practicable to remove this already existing and known danger, not whether it would have created further difficulties which in turn would have to be dealt with. The intention of the Act was to prevent employers from saying that they did not take the best method available because of the possible repercussions.

The onus was on the board to prove that they had taken all reasonable steps to avoid the breach. They failed to do that because all they showed was that, taking into account extraneous matters, they and the judge came to the conclusion that the better course was the one which they adopted. The correct test was whether, confining themselves to this obvious danger, they had taken all steps reasonably practicable to deal with that particular danger, notwithstanding that they might thereby have involved themselves in further difficulties which would then have had to be dealt with.

EVERSHED M.R. I will ask Romer L.J. to deliver the first judgment.

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Romer L.J. stated the facts and continued: It is possible to deal with the issue of common law negligence very briefly because the judge held on the evidence before him that the spragging up of this stone and the method of spragging were in accordance with the accepted and best mining practice. In that he was plainly right, and so any claim founded upon common law negligence disappears from the scene.

The main question which was argued before the judge and which has been argued before us is whether the board committed a breach of any statutory duty which was imposed upon them. In the statement of claim the plaintiff relied both on the Coal Mines Act, 1911, and on the Coal Mines (Support of Roof and Sides) General Regulations, 1947.[1] We were referred to some of those regulations, but they were not dealt with by the judge, nor have we heard any argument about them in this court. Mr. Laskey, for the plaintiff, told us that he had referred to the regulations mainly because the board had themselves relied upon one or more of them in their defence.

The statutory duty which is relied on by the plaintiff is that which is imposed by section 49 of the Coal Mines Act, 1911. [His Lordship read the section and went on:] Section 75 provides: "Any person who contravenes or does not comply "with any of the provisions of this Part of this Act"—and section 49 is in this Part of the Act—"shall be guilty of an "offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this "Part of this Act by any person whomsoever, the owner, agent, "and manager of the mine shall each be guilty of an offence "against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing "those provisions to prevent that contravention or non-compliance." Finally, section 102 (8) provides: "The owner of a "mine shall not be liable to an action for damages as for breach "of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown "that it was not reasonably practicable to avoid or prevent the "breach."

With regard to section 49, the judge held that the plaintiff was at the time of his accident engaged on the task of making the roof safe. He said: "What happened was this: as the attack "on the coal proceeded so the party came along behind at a "respectable distance pulling down the roof and building up,

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[1] (S.I. 1947, No. 973.)

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" with the rings or arches . . . The task that they were engaged " on was, of course, making the roof safe. When the coal is cut " away the shots are fired, the debris comes down, it is cleared " up, packed into the side walls and the overhead roof has to be " dealt with from the safety angle, and that is the job which the " plaintiff was engaged on when he met with this accident." It might possibly be contended that a ripping roof, such as that where the plaintiff was working, did not constitute a roof or sides for the purposes of section 49, but Mr. Gardiner, for the defendants, was content that for the purposes of this case the roof should be so regarded and that the place where the plaintiff was working should be treated either as being a travelling road or a working place, within the meaning of those expressions as they appear in section 49.

One approaches the question which arises, therefore, on that footing, and the question is whether, on the construction of the section, the board were in breach of it in permitting the plaintiff to work where he was working in the circumstances which resulted in his accident. If the purpose of the plaintiff's work was exploring or repairing, and if the plaintiff had been appointed to do that work, he cannot found an action for damages on section 49 because under the second part of that section he was entitled to work, and the board were entitled to employ him, at the place where the accident befell him, even though the place had not been made secure.

The first point to consider is whether the plaintiff, if the other necessary elements of the section had been satisfied, had been " appointed " for the purpose of exploring or repairing. It was conceded that an appointment for the purpose of that section need not be in writing, and I cannot see why it should be attended with any particular formality. Mr. Moylan said that he was prepared to concede that no writing would be required, but he said that there must be a sufficiently definite and certain method of conveying to the men in the mine who is the representative of the board for the purpose of exploring or repairing the travelling road and working places; and he said that all that the plaintiff was doing here was working as a miner and the evidence did not disclose anything in the nature of an appointment for the purposes of the section.

I cannot accept that. What the plaintiff was told to do appears from his own evidence. He was asked by his counsel: " (Q.) What instructions were you given by Golding? (A.) I " was just told to get on with the work. (Q.) With what "work? (A.) Packing the stone on the left-hand side. I "worked on the left-hand side. (Q.) And did you start to "do that? (A.) Yes." Then the judge asked: "You were "told just to get on with the work; what was it? (A.) To "pack the stone that was blown down. (Q.) What? (A.) The "coal dust and stuff that was all about the place we packed "that into the packhole. (Q.) What is that? (A.) It is "the space on each side where the coal has been excavated." Stable J. to counsel for the plaintiff: "I do not understand. "(A.) This was the stone that was blown down. (Q.) I know, "but I want to get a picture of the thing. When you arrived "on the scene what had happened? (A.) John Golding was "boring the lip. After the firing there is a lot of coal dust in the "lip and we first clear the space. As we had that done I helped "John Golding." It appears to me that if in fact what the plaintiff was doing can be described as work of reparation, then he was sufficiently appointed to do it. One must, therefore, I think, approach the section from that starting point.

The position of a man, not under this section but under an analogous provision, who was engaged in the work of repair connected with safety, was considered by Lord Asquith of Bishopstone in *Stapley* v. *Gypsum Mines Ltd.*[2] He was the only one of the Law Lords who referred to this particular point, because on the view which the other Law Lords took the question did not arise. What he was considering was the language of the Metalliferous Mines General Regulations, 1938,[3] and regulation 7 of those regulations was in very much the same terms, for present purposes, as the section which we are considering in the present case. Regulation 7 (3) provided: "The roof and sides of every "travelling road, outlet and working place shall be made secure, "and no person, unless engaged in repairing or in investigating "the safety of the workings shall travel on or work in any "travelling road or working place which is not so made secure."

Lord Asquith said[4]: "The company carried out its obligations "under regulation 7 (3) to the letter, if the first line and a half "of that regulation be read with the last two and a half lines. "If the company detail X and Y to repair a defect in the walls "or roof to restore safety, they cannot possibly, it seems to me, "be told that they are breaking the regulation by permitting

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[2] [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.

[3] (S.R. & O. 1938, No. 630, as amended by S.R. & O. 1945, No. 1351.)

[4] [1953] A.C. 663, 685.

"the repairers to work in a working place which, pending the "completion of the repair, is insecure." That observation of Lord Asquith has been adopted and applied in a decision of Glyn-Jones J., *Wraith* v. *National Coal Board*,[5] and in *Turner* v. *National Coal Board*,[6] which was decided by Streatfeild J. on December 8, 1954.

It appears to me, if I may respectfully say so, that the observation which Lord Asquith made was plainly right. In the illustration, however, which Lord Asquith gave, and in both the subsequent cases which I have mentioned, men were doing actual work of repair which was necessary in order to restore safety. It has been said that Lord Asquith's principle does not of necessity apply to the present case, and for this reason, that the plaintiff, who undoubtedly was not engaged on any work of exploration at the time when he met with his accident, was not engaged upon work of repairing. I confess that that has caused me some little trouble. In a sense, of course, it may be said that the nature of the operation which was going forward, the blowing down of the roof, the collection and shovelling away of the debris and the filling up of the excavations which had been left after the coal had been dug out, amounted to work of tidying up, repair and restoration, but I think that that is a rather forced application of the word "repair" to the facts. I agree with what Mr. Moylan said, that, prima facie, one repairs something which has already been made and which is unrepaired and needs to be repaired; for example, which I think was the case before Streatfeild J., where there was a roof which had been built and had sagged. One could accurately say that the work of restoring that roof to its former condition was work of repair, but it is not a normal use of the word "repair" to apply it to the making of something which was not already there before, namely, the extension of a travelling road.

I do not find it necessary to express any concluded opinion on that point because in my opinion the plaintiff is outside the scope of section 49 by an implication which I find quite irresistible and which arises from the opening words of the section: "The roof "and sides of every travelling road and working place shall be "made secure." Those words impose, as has been held in earlier cases, notably *Edwards* v. *National Coal Board*,[7] an absolute obligation on the employer, namely, to make the roof and sides secure. If a roof or sides require to be made secure, I do not know how this can be done unless men are sent in to do it. If, in a case like the present, the employers commit an offence by sending men to make, as distinct from repairing, a secure roof, the employers cannot perform the obligation which the first part of the section imposes upon them and are thus in breach of it. If, on the other hand, they do send men in, then, on the contrary argument, they are in breach of the second part of the section. The result would be that where a safe roof has to be provided and has to be made in an unsafe place, the employers cannot, in the absence of the implication to which I have referred, by any means avoid committing either one offence or the other.

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[5] [1954] 1 W.L.R. 264; [1954] 1 All E.R. 231.

[6] Not reported.

[7] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

This would appear to me to be an impossible position, and in my opinion, accordingly, an inevitable inference arises that the employers may lawfully take the necessary step to perform the obligation which is laid upon them and in the absence of which their statutory duty must in many cases remain unperformed. I say " in many cases " because most often the work would be work of actual repair, and, therefore, men sent in to do the work could lawfully be there, and the employers could lawfully send them under the express words of the second part of the section. But in a case such as the present, where there is no existing roof or sides which can properly be described as a roof or sides—because the whole point is to provide a safe roof and sides—then unless the implication to which I have referred is accepted, the position must, in my judgment, be as I have indicated.

I think that that appears to have been the view which the judge took, because I do not think that he did decide that the plaintiff was engaged on work of repair; at all events, he made no express finding about it. Having said that the men were engaged on work of safety, he referred to the first two lines of section 49, and then he said: " What that presupposes is this: " that as the coal is cut and the stone and debris brought down, " the roof and sides left like that are not secure and the section " imposes, in this case on the National Coal Board, the absolute " categorical duty of making that secure. That means that " somebody has got to go through when the roof is not secure " and carry out the necessary operation which does make it " secure. When that operation has been done, then the men, " one hopes, if it has been done properly, can work and move " about up and down what I shall call a tunnel, but probably " the correct phrase is a gate, without incurring any risk of the "wall and roof collapsing." Therefore, it appears to me that the plaintiff cannot rely on section 49, possibly because he was in fact engaged on work of repair, but even if he was not, then because, by the necessary force of the obligation expressly imposed upon the employers, he was there as being a man whom the board as employers were entitled, and indeed bound, to send there for the purpose of doing the work.

Mr. Moylan has met that point by saying that there is no reason to read any implication such as I have mentioned into this section; that the board were in breach of the section, on the assumption that the man was not doing work of repair, by having the plaintiff there at the time, and that the remedy of protection which is afforded to the board is to be found in section 102 (8). Mr. Moylan has said that that is the section on which the board must rely and that they cannot introduce an implication into section 49 or read words into it which are not there. I do not think that that suggested protection to the board is in law sufficient or is in any way a substitution for the words which I think should be incorporated by implication in section 49. As Mr. Gardiner pointed out, section 102 (8) only affords protection against civil liability, and would not afford protection against criminal prosecution for breach of statutory duty and that point would not be at all satisfactorily met by section 75. I think that that is true. In any case it appears to me to be a curious result that section 49 should be imposing an express obligation on an employer and at the same time saying: "You must not do it but you will "be all right if you can bring yourself within the language of "section 102 (8)." As I say, I do not think that section 49 applies at all in this case, and on that view the other part of the case, which proceeded on the hypothesis that the board had committed a breach of statutory duty imposed by section 49, does not arise.

I propose to say only a word or two about that part of the case. I have already said that the duty imposed by section 49 is an absolute duty, and that was laid down in, amongst other cases, *Edwards* v. *National Coal Board*.[8] The plaintiff says that section 102 (8) does not afford protection in the present case to the board because they have not shown, and the onus was upon them to show, that it was not reasonably practicable to avoid or prevent the breach which, ex hypothesi, arose. The plaintiff's case on that, putting it quite shortly, is this. He said in the first place that the board, through the charge hand and other relevant employees, should not have left the stone there, but should have brought it down, or, alternatively, if they did not bring it down, then they ought to have spragged it up in a more efficient manner than the manner in which they did sprag it up, and, therefore, they have not successfully shown that it was not reasonably practicable to have avoided this accident.

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[8] [1949] 1 K.B. 704.

With regard to the first suggestion, that the stone ought to have been taken down, it is quite clear to my mind on the evidence that not only was it in accordance with good mining practice to do what was done, namely, to leave the stone there and to sprag it up, but also that if they had brought it down, such an action would probably have been attended with very grave consequences. The only way of getting the stone down was to blow it down with explosives. The witnesses whose evidence the judge accepted all said that to adopt that course would have created a considerable danger of bringing the roof down with it, and three of them were men of considerable experience and the judge believed them. It may have been possible, and it may, on one view, have been practicable, to have brought the stone down, but on that evidence it cannot be said that it was reasonably practicable to have brought it down, having regard to the almost certain consequences, or if that is putting it too high, the very probable consequences which in the minds of these experts would have followed on such a course.

One must bear in mind in approaching this what was said by Lord Reid, amongst other learned Lords, in *Marshall* v. *Gotham Co. Ltd.*[9] Their Lordships were considering section 23 of the Metalliferous Mines Regulation Act, 1872,[10] and regulation 7 (3) of the regulations of 1938. Section 23 provided: "The following "general rules shall, so far as may be reasonably practicable, be "observed in every mine to which this Act applies." Regulation 7 (3) I read before. Lord Reid said this—the other Lords expressed similar views, but I think it is sufficiently crystallized by what Lord Reid said[11]: "But, in my judgment, there may well be "precautions which it is 'practicable' but not 'reasonably prac- "'ticable' to take, and I think that that follows from the decision "of the Court of Appeal in *Edwards* v. *National Coal Board*.[12]

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[9] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

[10] (35 & 36 Vict. c. 77).

[11] [1954] A.C. 360, 373.

[12] [1949] 1 K.B. 704.

"I agree with what was said in that case by Asquith L.J. (as "he then was), and I do not find it helpful to consider whether "this statutory duty is in every case the same as an employer's "common law duty. I think it enough to say that if a pre-"caution is practicable it must be taken unless in the whole "circumstances that would be unreasonable."

It appears to me to be plain on the evidence that it would have been unreasonable, and therefore not reasonably practicable, to have put a charge of explosives in this stone and brought it down. That being so, the only other step which was ever suggested by anybody which could have been taken to deal with the position was to sprag it up, and that was done. The judge found as a fact that the spragging was properly done, and he expressed his conclusions upon the point as follows—he was referring to putting the sprag into position: "I am satisfied that "properly executed that was the proper safety precaution to "take. Was the job done properly? It seems on the evidence "that it was. Merriman, who actually did the work, told me "how he had done it and Mr. Fraser, the deputy, inspected the "job after it had been done and passed it as a perfectly "satisfactory job."

It appears to me, accordingly, that it is impossible for the plaintiff successfully to say that the second and only practicable alternative which was open to the board was not adequately and efficiently performed. It seems to me that what was done, as the judge found, was not only in accordance with ordinary mining practice, but it was efficiently and properly done and the doing of it constituted the only alternative that was reasonably open to the board to take. Accordingly, had the point become necessary for determination I should have concluded, as did the judge, that the board were entitled to the protection of section 102 (8).

I refer in conclusion only to the possibility, which the judge, I think, was inclined to accept as reasonably likely, that in effect the plaintiff, of course wholly unintentionally, was the author of his own misfortune in displacing the sprag himself whilst working in the roadway. The charge hand gave evidence that he had warned the plaintiff about this, and when he was asked his views as to whether such a thing might happen, he said that it very well might happen. It is, however, not necessary to arrive at a conclusion as to what actually was the cause of the sprag giving way or the accident occurring, but it is sufficient to say that it was not a cause, in my judgment, for which the board can be held responsible. I would, accordingly, dismiss this appeal.

Evershed M.R. I am of the same opinion. I shall add a very few observations upon the main question which arises under the terms of the Coal Mines Act, 1911; and those few observations I add only out of respect to the argument and because the main question is, I think, not easy, as it is certainly not unimportant.

But I ought first to say something on another point raised by Mr. Laskey in opening. He said that the judge took a very strongly hostile view of the plaintiff, whom he regarded as a malingerer to a substantial extent. I am aware that it is easy, not having suffered an injury, to criticize others who give way to the nervous effects of a hurt they have received. I am also aware that the plaintiff in this case is certainly not the first man, and is not likely to be the last, who may find that the prospect of what has been called wealth beyond the dreams of avarice does not provide a stimulus to his recovery. But it is a fact well established in medicine that the defeat of what is called traumatic neurasthenia depends upon a degree of self-discipline and will power on the part of the sufferer. Having regard to the medical evidence in this case, I should say, in case it is of any consolation to the plaintiff, that, so far as I can form any judgment, he could not in any circumstances have recovered a sum approaching the figure he claimed, based as it is upon loss of wages for three years or more at a rate of about £1,000 per annum. The more important point, however, is that a judge should not, plainly, and I am quite satisfied that this judge did not, allow the view that the plaintiff's claim may be unmeritorious to influence his decision on the difficult question of law which has been raised.

On section 49 I only add to what my brother has said this much. On its terms the section plainly imposes an obligation which, so far as criminal liability is concerned, is plainly absolute. The absolute nature of the obligation, qualified only as to civil liability by section 102, was the subject of the decision in *Edwards* v. *National Coal Board*.[13] It would indeed be strange, it would indeed be a manifest absurdity, if the statute were at one and the same time to impose an absolute obligation

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[13] [1949] 1 K.B. 704

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to make a place secure, and to couple that obligation with an absolute prohibition against allowing anybody to make it secure. On these grounds, as my brother has pointed out, it is plain that one answer is to treat the making of the place secure as necessarily and impliedly excluded from the operations which otherwise cannot be allowed.

But if that were not the right construction, I should conclude that what the plaintiff was engaged in doing was an operation of repairing. I agree with Mr. Moylan that the word "repair" in its ordinary context indicates the putting back into good condition of something that, having been in good condition, has fallen into bad condition. That is undoubtedly the ordinary sense of the word "repair" when it is applied to a travelling road; but this was not a travelling road but a working place; and when the word "repair" is applied to a working place, it seems to me certainly no extravagant distortion of its meaning to say that it would include such an operation as that which was being performed.

If then, as I hold, and as the judge held, the plaintiff was not within the scope of section 49, that is the end of the matter. But if he was within the scope of section 49, then the absolute liability in this civil action may be qualified by section 102 (8). Again I agree with the judge that, upon the hypothesis I am now considering, the board did discharge the onus which that subsection placed upon them. I will assume that the obligation to do everything that was reasonably practicable may well be an obligation greater than the common law would impose. But the question whether that which was done was an excuse within subsection (8) has to be considered at the time when the decision had to be taken. This is not a case where the employers did nothing and where they would have to show that it was not reasonably practicable to do anything. This was a case in which steps were taken to perform the obligation, that is the obligation not to put or allow men to work in a place not made secure. On the evidence they could then do one of two things in order to comply. They could sprag the stone, or they could dislodge it by using explosives. Those were the only two alternatives that, at the relevant time, presented themselves. The board chose the former, which, upon the evidence accepted by the judge, was, technically speaking, plainly preferable. If that is so, it would appear to me that though to have blown out this stone would have been, or I will assume it would have been, feasible, or practicable from an engineering point of view, it would have been unreasonable as being the less to be preferred method of meeting the situation. It seems to me that if the board established that that which they did not do was, though practicable, unreasonable, they should be taken to have established that that alternative was not reasonably practicable.

I agree with my Lord that this appeal should be dismissed.

BIRKETT L.J. I also agree and have nothing to add.

*Appeal dismissed.*

Solicitors: *Bryan O'Connor & Co.; Donald H. Haslam.*

E. D.

## SIDNEY BOLSOM INVESTMENT TRUST LTD. *v.* E. KARMIOS & CO. (LONDON) LTD.

[1955 S. No. 3058.]

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Denning and Morris L.JJ. and Harman J.

*Landlord and Tenant — Act of* 1954 — *Business premises (Security of tenure)—Duration of new tenancy—Request by tenants in prescribed form for new tenancy "on terms of current lease"—Current lease for seven years—Whether "terms" in Act of* 1954 *includes duration —Duration by implication sufficient—Validity of request—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24 (1), 26 (3) (5), 29 (3), 35.

*Evidence—Document, to vary—Notice—Request for new tenancy in prescribed statutory form—Bona fide mistake in request—Whether parol evidence admissible to prove mistake—Request formal document with specific legal consequences—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56).

*Estoppel—By conduct—Law, as to—Landlord and tenant—Request for new tenancy—Notice of opposition to new tenancy by landlords—Landlords' notice containing statement that tenants' request invalid —Whether landlords estopped in action for possession from asserting validity of request.*

On December 7, 1954, tenants of shop premises within the protection of section 24 (1) of the Landlord and Tenant Act, 1954,[1]

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[1] Landlord and Tenant Act, 1954, s. 24: "(1) A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions "of this Part of this Act; and, sub-"ject to the provisions of section "twenty-nine of this Act, the tenant "under such a tenancy may apply "to the court for a new tenancy— ". . . (b) if the tenant has made a "request for a new tenancy in

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and held on a seven-year lease due to expire on June 24, 1955, served on the landlords a notice under section 26 (3) in the prescribed form requesting a new tenancy as from June 25, 1955, at a new stated rent and "as to the other terms of the new tenancy ". . . upon the terms of the current tenancy as set out" in the original lease. On December 23, 1954, the tenants' solicitors informed the landlords by letter that they had not stated in the request the length of term for which a new lease was sought and that the term sought was 14 years. On January 26, 1955, the landlords served on the tenants a notice that they would oppose the application for a new tenancy on the ground, inter alia, that "no valid request for a new tenancy has been served in the "prescribed form." The tenants thereafter took no further step by way of further notice or application to the county court for a new tenancy but remained on after the expiry of their current lease. The landlords brought an action for possession, claiming that as the tenants had not applied to the court within four months of serving their request they were precluded by the terms of section 29 (3) [1] of the Act from making such application and the tenancy had accordingly come to an end. The tenants by their defence claimed that their request was invalid, or alternatively that the landlords were estopped by the terms of their notice of opposition from asserting that the request was valid.

Before Havers J. parol evidence was admitted to show that the tenants had intended to ask for a new tenancy of 14 years, but that, by reason of a bona fide mistake, the notice of request was by implication a request for a new lease of seven years' duration (namely, the term of the "current tenancy"). The trial judge

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"accordance with section twenty-six "of this Act."

S. 26: "(3) A tenant's request for "a new tenancy shall not have effect "unless it is made by notice in the "prescribed form given to the landlord and sets out the tenant's proposals as to the property to be "comprised in the new tenancy "(being either the whole or part of "the property comprised in the current tenancy), as to the rent to be "payable under the new tenancy and "as to the other terms of the new "tenancy. . . . (5) Where the tenant "makes a request for a new tenancy "in accordance with the foregoing "provisions of this section, the current tenancy shall . . . terminate "immediately before the date specified in the request for the beginning of the new tenancy."

S. 29: "(3) No application under "subsection (1) of section twenty-four of this Act shall be entertained "unless it is made not less than two "nor more than four months after "the giving of the landlord's notice "under section twenty-five of this "Act or, as the case may be, after "the making of the tenant's request "for a new tenancy."

S. 35: "The terms of a tenancy "granted by order of the court under "this Part of this Act (other than "terms as to the duration thereof "and as to the rent payable thereunder) shall be such as may be "agreed between the landlord and "the tenant or as, in default of such "agreement, may be determined by "the court; and in determining those "terms the court shall have regard "to the terms of the current tenancy "and to all relevant circumstances."

S. 69: "(1) In this Act the following expressions have the meanings "hereby assigned to them respectively, that is to say:—. . . "'terms', in relation to a tenancy, "includes conditions."

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held that parol evidence was admissible since the notice of request was not a contractual document; but that the effect of the letter seeking to cure that mistake was to invalidate an originally valid request which properly stated duration; and that accordingly as there had been no valid request the tenants were entitled under the Act to remain in the premises until the tenancy was terminated by either party in accordance with the provisions of the Act. On appeal by the landlords:—

*Held,* (1) that a tenant's request under section 26 (3)[1] of the Act must include a proposal as to the duration of the new tenancy asked for; and that this request was valid in that it asked by implication for a new seven-year tenancy.

*Per curiam.* The word "terms" in the Act of 1954 includes duration.

(2) That parol evidence was not admissible to show mistake in a notice of request, which was a formal document with specific legal consequences.

(3) That the landlords' statement that the request was invalid was not an unequivocal representation inviting the tenants to act or refrain from acting on it, and they were therefore not estopped from relying on the request as valid in an action for possession against tenants who had not applied to the court for a new tenancy within the prescribed time.

Accordingly the landlords were entitled to possession.

*Per* Denning L.J. A representation about the legal position—about the legal effect of a document, for instance—can give rise to an estoppel.

Decision of Havers J. reversed.

APPEAL from Havers J.

On September 27, 1948, the landlords of business premises, Sidney Bolsom Investment Trust Ltd., let them to lessees on a lease for seven years which at common law would have expired on June 24, 1955. The lease gave the lessees an option for a further seven years' term at a rent to be agreed. In June, 1949, the lease was assigned to E. Karmios & Co. (London) Ltd., who paid a rent of £175 a year. In November, 1954, the landlords by letter told the tenants that for a considerably increased rent or at the existing rent with a high premium the tenants might have a new tenancy of 14 or 21 years' duration.

The tenancy being one to which Part II of the Landlord and Tenant Act, 1954,[1] applied, the tenants, after the Act came into force, served on the landlords on December 7, 1954, a notice of request under section 26 of the Act of 1954 for a new tenancy of the premises, to begin on June 25, 1955, that being the day after the expiry of the current lease. The request was made by notice in the form prescribed by regulations made under the Act

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[1] For note see pp. 529–530.

—a form consisting partly of words in print and partly in typescript, reading, so far as relevant, as follows: "(1) We . . . "request you to grant us a new tenancy commencing on the "25th day of June 1955 . . . (3) Our proposals as to the rent "to be payable under the new tenancy and as to the other "terms of the new tenancy are "—(there followed in typescript) "—an annual rent of £200 per annum upon the terms of the "current tenancy as set out in the lease dated September 27, "1948."

On December 23, 1954, the tenants' solicitors wrote to the landlords as follows: "Upon perusing our copy, we notice that "we have not stated in the notice the length of term for which "a new lease is sought. The term sought is a maximum term "of 14 years."

On January 26, 1955, the landlords served on the tenants a notice that they would oppose the application to the court for a new tenancy, their notice being in the form prescribed in the Act and stating as follows: " . . . We will oppose an application "to the court under Part II of the above-mentioned Act for the "grant of a new tenancy on the grounds that (1) No valid "request for a new tenancy has been served in the prescribed "form. (2) You have obligations as respects the repair and "maintenance of the premises and that you ought not to be "granted a new tenancy in view of the state of repair of the "premises which has resulted from your failure to comply with "those obligations."

After receipt of that notice the tenants took no further step, but remained on in the premises. On July 21, 1955, the landlords issued a writ claiming possession of the premises. By their statement of claim they alleged that the tenants had served a request on them on December 7, 1954; that no application had been made to the court for a new tenancy within four months of making that request under section 24 (1) of the Act; and that accordingly by virtue of section 29 (3) no application could now be entertained. Accordingly, they claimed, the tenants' tenancy had come to an end on June 24, 1955.

By their defence the tenants stated that their request of December 7 was not in the form prescribed in that it did not set out their proposals as to the term of the new tenancy, and that the request was therefore without effect. Further, or in the alternative, they claimed that by the form of notice served on them on January 26, 1955, the landlords had contended that no valid request for a new tenancy had been served in the prescribed form, and that they had thereby rejected the request and had treated it as one which had not taken effect to terminate the tenants' current tenancy. They claimed further that in reliance on the landlords' rejection of their form of request, they (the tenants) had not started proceedings in the county court for a new tenancy founded on their own form of request; and that the landlords were now estopped from alleging that the request was in the prescribed form and that it had taken effect to terminate the tenants' current tenancy.

At the hearing of the action before Havers J. parol evidence was admitted to show that the request was invalid. Assuming that on the true construction of the words in the form "upon "the terms of the current tenancy as set out in the lease" the request was impliedly a request for a new lease of seven years' duration, it was made under a mistake, because the tenants had intended to ask for 14 years. In his judgment on October 20, 1955, the judge held that the evidence was admissible because this notice of request was not a contractual document, and as a result of receiving it the landlords had not acted to their detriment or at all; that the failure to put in the period of 14 years was a bona fide mistake which the letter of December 23 from the tenants' solicitors sought to cure, but that in the result the effect of that letter was to invalidate the original valid request, and as no valid request had been made the tenancy continued indefinitely by operation of the Act until terminated by either party in accordance with the provisions of the Act. His Lordship refused the order for possession and gave judgment for the tenants.

The landlords appealed.

*Montague Waters* for the landlords. If, first, the word "terms" in this Act includes "the term," such that "other "terms of the tenancy" in section 26 (3) and in the prescribed form require the tenant to state the duration of the new term requested, then the tenants' request of December 7, 1954, was a valid request for a new tenancy for seven years, the duration being sufficiently implied by the reference to the old lease; and coupled with the letter of December 23 it was a valid request for a new tenancy for 14 years; for if the original request was valid, the letter which followed it could not affect its validity. The tenants, having thus put the machinery of the Act into operation, and having failed to follow it up by an application to the court within four months of making the request, are now excluded by section 29 (3) from making any such application, with the result that the tenancy came to an end on June 24, 1955.

If, on the other hand, the tenants are not by the terms of section 26 (3) required to state duration, their request is still valid, for it set out their proposals; and the duration of the new tenancy is a matter which the court has a discretion to fix under section 33. Thus, on either construction of the section and the form, this request was valid.

Secondly, Havers J., having decided that the Act required the request to state the duration of the new tenancy asked for and that the original request in this case was a valid request for a tenancy of seven years, permitted parol evidence to be given to show that the tenants' true proposals were not put into their request because what they desired was a 14-year term; and on that evidence he held that the originally valid notice had been invalidated by the letter following it, and that accordingly there was no valid request, so that the tenant remained within the protection of the Act. It is submitted that that parol evidence was wrongly admitted and wrongly made the basis for the decision. Nothing in the tenants' pleadings alleged that the request for seven years was made under a mistake; and though the tenants may be entitled in certain circumstances to contend that their own request was invalid, they cannot say that that which they set out in the prescribed form did not amount to their proposals, or call evidence to prove that. The landlords have acted on the basis of the original request by treating it as valid and bringing these proceedings for possession, as well as by refusing to accept rent. The tenants are thus estopped from relying on the invalidity of the request, and parol evidence cannot be admitted to contradict their written proposals. When a formal notice is served on a landlord legal consequences flow from it, and it must therefore be taken to mean what it says.

Thirdly, the tenants by their defence to these proceedings claimed that the landlords were estopped from contending that the request was valid because they had in their notice of opposition to a new tenancy stated that no valid notice of request had been served on them in the prescribed form. The judge heard argument on that point, but did not find it necessary to decide the point.

[Counsel was not required to argue on the point as to estoppel.]

*H. T. Buckee* for the tenants. First, the notice of request by the tenants under section 26 must include their proposals as to the duration of the new term. Support for that is found in the definition of "terms" in section 69, viz., that "terms" includes "conditions." The whole intention of this part of this Act requires the tenant to make proposals which the landlord, with time to consider them, may accept or reject. Although under section 33 the court has a discretion to decide the duration of the new tenancy if it is not agreed between the parties, it is clear that the provisions of the Act are intended to lead to agreement and not to litigation: see section 28, which provides for that which is to happen if there is agreement. The notice in the prescribed form thus has two functions: (*a*) it is a proposal capable of acceptance or rejection; and (*b*) it operates as a notice to quit which determines the tenants' statutory prolongation of his tenancy. It is thus a most important document and must set out all the essential terms, and be in such form that it could be accepted by the landlords without further inquiry. If the tenant does not state the duration of the term he seeks, the notice is invalid and does not take effect.

Secondly, the present request was not a request for a seven-year term. It was silent as to the duration of a future tenancy, or at the most referred by implication to a past and not to a future term.

Thirdly, that being the position on the original request, the judge found on evidence that, because of a mistake of fact by the solicitors' clerk, the original notice had not included the request for a 14-year term, and that there was therefore no valid request. Parol evidence was admissible to prove that mistake, for in so far as this notice was a contractual document in the nature of an offer, it was rejected by the landlords' notice of opposition. It thereupon ceased to be a contractual document and the tenants were entitled to call parol evidence to explain or contradict its meaning. There is no rule of law which prevents calling such evidence to contradict writing save in limited circumstances: see Taylor on Evidence, vol. 2 (1931 ed.), p. 720, that the rule as to restricting parol evidence is limited to contractual instruments. There is estoppel by deed, but not by writing. If the landlords had accepted what they read as a request for a new seven-year tenancy and the tenants had then sought to show that they had intended to ask for 14 years the case would be different. But an unaccepted offer admits of parol evidence to show that the request was invalid.

[DENNING L.J. Why did not the letter of December 23 clear up the original mistake?]

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If the landlords had accepted the informality it might have done; but as they did not do so, regard must be had to the requirements of the Act, which are that the request must be in the prescribed form; time begins to run from the making of the request, and therefore the subsequent letter could not be taken as part of the original request. The proposals do not all have to be on the same piece of paper, but they must be submitted at one and the same time.

Fourthly, the landlords are estopped from contending that the request was valid, because in reliance on their statement in their notice of opposition that no valid notice had been served on them the tenants did not apply to the county court within the prescribed time.

[DENNING L.J. But the statement in the landlords' notice was not an unequivocal statement of fact. All that they said was that they would oppose a new tenancy on the ground that no valid request had been received. Where is the evidence that they intended the tenants to act on it?]

Where the words "on the ground that" are used, what follows is a statement of fact. The statement was the direct cause of the tenants taking no further step.

[MORRIS L.J. Both parties knew that something had been served. The emphasis in the landlords' counter-notice is on the word "valid"; and the test of validity is whether the request satisfied section 26 (3). That is law and not fact.]

The court should not be astute in favour of the landlords to say that this request was good when the landlords themselves said it was bad: see *per* Luxmoore J. in *De Tchinatchef* v. *Salerni Coupling Ltd.*,[2] which shows that one may have a statement taken on a matter of construction from which one cannot afterwards resile. The cases on estoppel cover a statement of this kind. [*Central London Property Trust Ltd.* v. *High Trees House Ltd.*[3]; *Robertson* v. *Minister of Pensions*,[4] and *In re Swanson's Agreement*, *Hill* v. *Swanson*[5] were referred to.]

*Waters* in reply. Nothing in this Act requires a notice of request to be accepted or deals with acceptance or rejection of such a notice. It is not an offer which by acceptance can be turned into a contract, for the language of this document is not that of offer but that of a notice under section 26. If an acceptance had been sent by the landlords, that acceptance would be the offer. If this document is an offer, it has a dual capacity: (*a*) a statutory notice of request and (*b*) an offer at common law. If it is (*b*) all questions of amendment are, it is conceded, relevant; but inasmuch as it is a statutory request under section 26, these questions of acceptance, rejection, counter-offer and so on are irrelevant to the question whether or not it is a valid request under section 26 (3).

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[2] [1932] 1 Ch. 330, 342.

[3] [1947] K.B. 130; 62 T.L.R. 557.

[4] [1949] 1 K.B. 227; 64 T.L.R. 526; [1948] 2 All E.R. 767.

[5] [1946] 2 All E.R. 628; 62 T.L.R. 719.

DENNING L.J. In 1948 the landlords, Sidney Bolsom Investment Trust Ltd., let some business premises at 707, Romford Road, Manor Park, to lessees under a lease for seven years from June 24, 1948, at a rent of £175 a year on various terms and conditions, including, among other things, an option for a further lease for seven years at a rent to be agreed. In 1949 the lease was vested in lessees called E. Karmios & Co. (London) Ltd. At common law it would come to an end on June 24, 1955; but before that time the new Landlord and Tenant Act, 1954, came into operation. That Act gives an automatic extension of a lease of business premises. The lease is automatically extended without any step being taken by either party, and this extension continues indefinitely, unless and until it is determined in accordance with the Act. One way of determining the statutory extension (or stopping it from arising) is for the landlord to give notice of determination himself. Another way is for the tenant to make a valid request for a new tenancy. Each of these requires six months' notice before it takes effect. If the tenant wishes thereafter to stay on in the premises, he must apply to the county court for a new tenancy to begin as soon as the statutory extension comes to an end.

We are here concerned with a tenant's request for a new tenancy. On December 7, 1954, when the lease had just over six and a half months to go, the tenants made a request for a new tenancy which they asked should commence on June 25, 1955. If that request was a valid request, it operated to terminate the tenant's interest on the day "immediately before the "date specified in the request for the beginning of the new tenancy": see section 26 (5) of the Act. It would therefore bring the tenant's interest to an end on June 24, 1955, the very day on which the contractual lease expired. It would thus stop the statutory extension from arising at all.

The tenants, having thus themselves brought their existing tenancy to an end, should have followed up their request with an application to the court for a new tenancy. They had four months in which to do it under the provisions of section 29 (3) of the Act; but they did not do it within the permitted time or, indeed, at all. The result is that their interest came to an end on June 24, 1955, and they must quit unless they can in some way avoid the result.

The way they seek to do it is by throwing over their own request. They say that it was not a valid request because it did not comply with section 26 (3) of the Act, which provides that "A tenant's request for a new tenancy shall not have effect "unless it is made by notice in the prescribed form given to the "landlord and sets out the tenant's proposals as to the property "to be comprised in the new tenancy (being either the whole or "part of the property comprised in the current tenancy), as to "the rent to be payable under the new tenancy and as to the "other terms of the new tenancy."

In this case the request of December 7, 1954, was made by notice in the prescribed form. The tenants got a printed form which was an exact copy of the statutory prescribed form, and they filled it in. They gave first the time when they wanted the new tenancy to begin, June 25, 1955. They said secondly: "We "propose that the property to be comprised in the new tenancy "should be the whole of the property comprised in the current "tenancy." And then thirdly—the important part for our purposes: "Our proposals as to the rent to be payable under "the new tenancy and as to the other terms of the new tenancy "are an annual rent of £200 per annum upon the terms of the "current tenancy as set out in the lease dated the 27th day of "September, 1948."

Mr. Buckee, for the tenants, says that the request, in order to be valid, ought to state the *duration* proposed for the new tenancy. It is to be noticed that section 26 (3) does not expressly require the tenant to set out his proposals as to the duration of the new tenancy. He has only to set out the rent and "the other terms of the new tenancy." But I think that, in this context, the "other terms" include the duration of the tenancy. That is seen by looking at section 35, from which it appears that "terms" in this Act includes not only terms like the covenant to repair but also the term as to the duration of the tenancy. In addition, it is obvious that the proposed duration of the new tenancy is one of the most important matters which the landlords would want to know. The question whether they should accept the proposed rent will often depend very much on the proposed duration of the tenancy. The tenant should, therefore, state his proposal for duration, but it can, I think, be done sufficiently by implication.

The first question in this case is: does the proposal in the request sufficiently set out the duration of the new tenancy? I think that it does. The proposal is for "an annual rent of £200 "upon the terms of the current tenancy dated the 27th day of "September 1948." The word "terms" in that proposal must have the same meaning as the word "terms" in the earlier part of the same sentence, and that in turn has the same meaning as the word "terms" in section 26 (3) of the Act. It includes, therefore, all the terms in the current lease, that is, not only the covenants to repair and so forth but also the term as to duration, namely, seven years, and the other term as to an option and so forth. The proposal therefore complied sufficiently with the Act in that it impliedly proposed a duration of seven years for the new tenancy.

Mr. Buckee next said that the request was invalid because it was made under a mistake. If the proposal on its true construction, he said, asked for seven years, then it was made by the tenants under a mistake because they intended to ask for 14 years and not for seven years. The judge admitted evidence in support of this mistake. He heard the evidence of Mr. Karmios himself and also of his solicitor's managing clerk, and held that there was a mistake in that the request should have asked for 14 years and did not; and that the request was therefore invalid.

I do not think that that evidence was admissible. This case falls, to my mind, within the general principle that parol evidence cannot be admitted to add to, vary, or contract the terms of a written document. Once a tenant, whatever his inmost state of mind, has to all outward appearances made a valid request in the prescribed form setting out his proposals, he cannot thereafter rely on his own mistake to say that it was a nullity or invalid, no matter how important the mistake was. The validity of the request must be judged by the true interpretation of it without regard to what happened behind the scenes. It is a formal document with specific legal consequences and must be treated as such. If the proposals had ripened into a contract, the mistake might in some circumstances be a ground for setting the contract aside in equity, but it would not render the contract a nullity from the beginning, nor does it render the request invalid.

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Mr. Buckee next relied on the letter of December 23, 1954, in which the solicitors for the tenants said to the landlords: "Upon perusing our copy, we notice that we have not stated in "the notice the length of term for which a new lease is sought. "The term sought is a maximum term of 14 years." Mr. Buckee said that, after receiving that letter, the landlords knew that the original request was made under a mistake and they could not thereafter assert that it was valid. The judge seems to have accepted that contention, but I do not think it is correct. It is plain that, after that letter, the landlords could not accept the original proposals so as to turn them into a binding contract as they stood, but I do not think that the letter affects the validity of the request as a request. The tenants could still make it the basis of an application to the county court for a new tenancy: and the court would be free to grant a new lease for a term up to 14 years.

The last point taken by Mr. Buckee was one of estoppel. He said that the landlords could not be heard to say that the request was valid. He based this on the notice of opposition given by the landlords on January 28, 1955, in which they said: "We will oppose an application to the court under Part II of the "above-mentioned Act for the grant of a new tenancy on the "ground that (1) no valid request for a new tenancy has been "served in the prescribed form; (2) you have obligations as "respects the repair and maintenance of the premises and that "you ought not to be granted a new tenancy in view of the "state of repair of the premises which has resulted from your "failure to comply with these obligations." Mr. Buckee says that, on receipt of that notice, the tenants took the landlords at their word. They accepted the view that no valid request had been served and, on the faith of that, refrained from applying to the county court for a new tenancy.

Now I quite agree that a representation about the legal position—about the legal effect of a document, for instance—can give rise to an estoppel. That is amply shown by *De Tchinatchef* v. *Salerni Coupling Ltd.*[1] to which Mr. Buckee referred us, and the Privy Council case (*Calgary Milling Co. Ltd.* v. *The American Surety Co. of New York*[2]) therein referred to, as well as several later cases. But in order to work as an estoppel, the representation must be clear and unequivocal, it must be intended to be acted on, and in fact acted on. And when I say it must be "intended to be acted upon," I would add that a man must be taken to intend what a reasonable person would understand him to intend. In short, the representation must be made in such circumstances as to convey an invitation to act on it. It seems to me that the representation in this case conveyed no such invitation. The landlords by their notice of opposition did not suggest that the tenants should refrain from applying to the county court. On the contrary, their notice of opposition assumed that the tenants would apply to the county court within the permitted time: and gave them notice that at the hearing the landlords would take the point that no valid request had been served. It was simply a point taken by the landlords for what it was worth, and it was for the tenants to make up their own minds whether it was a good point or a bad point, and to act as they thought fit. If they were certain that their own request was invalid, then, of course, they need make no application to the county court for a new tenancy; but if they were not certain whether it was valid or not, their only safe course was to apply to the court within the permitted time; because, if it was valid, it brought their interest to an end and they would only be able to stay in the premises if they got a new lease. In my opinion, therefore, there was a valid request; there was no application by the tenant to the county court within the prescribed time and the lease came to an end on June 24, 1955. I would, therefore, allow the appeal and give judgment for the landlords for possession.

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[1] [1932] 1 Ch. 330.

[2] (1919) 3 W.W.R.(Canada) 98.

Morris L.J. I have reached the same conclusion. The question which arises is whether the request dated December 7, 1954, was a request made in accordance with the provisions of the Act. Section 26 (5) provides: "Where the tenant makes "a request for a new tenancy in accordance with the foregoing "provisions of this section, the current tenancy shall, subject "to the provisions of subsection (2) of section thirty-six of this "Act and the provisions of Part IV of this Act as to the interim "continuation of tenancies, terminate immediately before the "date specified in the request for the beginning of the new "tenancy."

The request dated December 7 was one for a new tenancy starting on June 25, 1955. As there were no proceedings initiated in the county court in the form of an application made by the tenant under section 24 of the Act the provisions of the subsection to which I have just referred apply, if the request was a valid request. If it was, then the tenancy terminated on

June 24, 1955. It is a curious feature of this case that those who served the request are now concerned to submit that it was in bad form and those who took the point that it was in bad form are now making the submission that really it was quite all right. But the point has to be determined by the court by reference to the document itself, looked at having regard to the provisions of the Act. When a request is made, it is the document, in the form in which it was received by the recipient, that has to be looked at.

Section 26 (3) provides that the request shall not have effect unless it is made in the prescribed form. It is relevant to note that the word is "in" and not "on." A form has been prescribed by regulation. The notice to be given to the landlord in the prescribed form must set out the tenant's proposals as to the property to be comprised in the new tenancy. It must set out whether it is the whole or part of the property comprised in the current tenancy. The notice has also to set out the rent to be payable under the new tenancy and the "other terms" of the new tenancy.

I have reached the conclusion that the duration of the requested new tenancy must be set out. If section 26 (3) had stood alone, this matter might be difficult of determination. But I think that regard must be had to the provisions of sections 32, 33, 34 and 35. The first of those, section 32, is dealing with the property which is to be comprised in the new tenancy. Section 33 reads as follows: "Where on an application under "this Part of this Act the court makes an order for the grant "of a new tenancy, the new tenancy shall be such tenancy as "may be agreed between the landlord and the tenant, or, in "default of such an agreement, shall be such tenancy as may "be determined by the court to be reasonable in all the circum-"stances, being, if it is a tenancy for a term of years certain, "a tenancy for a term not exceeding fourteen years, and shall "begin on the coming to an end of the current tenancy.

Section 34 concerns rent; and then section 35 provides as follows: "The terms of a tenancy granted by order of the court "under this Part of this Act (other than terms as to the dura-"tion thereof and as to the rent payable thereunder) shall be "such as may be agreed between the landlord and the tenant "or as, in default of such agreement, may be determined by "the court; and in determining those terms the court shall have "regard to the terms of the current tenancy and to all relevant "circumstances."

The words in the opening part of section 35 "The terms of "a tenancy granted by order of the court under this Part of this "Act (other than terms as to the duration thereof and as to the "rent payable thereunder)" denote, I think, that, when used in this Act, the word "terms" includes duration. I ought to add that section 69 provides that: "In this Act the following "expressions have the meanings hereby assigned to them respec- "tively . . . 'terms', in relation to a tenancy, includes "conditions." I therefore think that it was and is necessary, in a request form, to set out the duration of the new tenancy that is requested.

Looking, then, at the document that was sent in this case, it is only necessary for present purposes to consider the third paragraph, which reads: "Our proposals as to the rent to be "payable under the new tenancy and as to the other terms of "the new tenancy are an annual rent of £200 per annum upon "the terms of the current tenancy as set out in the lease dated "September 27, 1948."

The word "terms" is used in the opening part of that paragraph, and then is used in the words at the end of it, "upon "the terms of the current tenancy." I think that the paragraph must be read as meaning that the application was for a new tenancy of the duration of seven years. I think, therefore, that the request was a good request. It was a request for a new tenancy made in accordance with the provisions of section 26.

There was a later letter of December 23 in which reference was made to the notice, and which proceeded: "Upon perusing "our copy we notice that we have not stated in the notice the "length of term for which a new lease is sought. The term "sought is a maximum term of 14 years." For the reasons that I have given, I think that the request had stated the length of the term for which a new lease was sought. This letter, however, conveyed an intimation that it was desired to have a term of 14 years. The landlords had themselves intimated in a letter of November 4 that at a considerably increased rent or at the existing rent with a high premium the tenant could have either 14 or 21 years of duration of tenancy. This later letter of December 23 did not purport to withdraw the previous request for a new tenancy. If there had been an application by the tenant and the matter had come before a county court judge, I cannot conceive that the point would successfully have been taken that there was not a valid request for a new tenancy made in accordance with section 26 of the Act.

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When the landlords served a notice that they would oppose an application, they set out one of the grounds of opposition mentioned in section 30 of the Act. They indicated that they were going to rely on the ground covered by section 30 (1) (*a*) of the Act. But, in addition, they said that they were giving notice that they would oppose the validity of the application on the ground that "No valid request for a new tenancy has been "served in the prescribed form." That, as it seems to me, was merely an indication that if there were an application, that point would be argued when the application was heard. Both parties knew what was in any document and it was for both parties to decide whether there had been a valid request for a new tenancy. It does not seem to me that anything stated by the landlords here was tantamount to an invitation to the tenants to take any particular course: it was merely advising the tenants as to a proposition or argument or contention that would be advanced in a certain event. The tenants were not asked to act on it; it was for the tenants to decide what course they would follow.

For these reasons it seems to me that there was a valid request, and that as there was no application to the court by the tenants, the consequences denoted by subsection (5) of section 26 follow and result. I think, therefore, that the appeal succeeds.

HARMAN J. I agree. I cannot regard the draftsmanship of section 26 (3) of the Act with any enthusiasm. I think the draftsman has got himself involved in this, that he was talking or wishing to talk about a term of years, but he had already got into his head the words "terms of the tenancy" and was, therefore, likely to land himself in obscurity. The result is that he has produced something which I must say on first looking at it led me to suppose that it was not necessary for the statutory form of request to mention the length of the term of years required; but, having regard to the later sections of the Act and having regard also to the obvious importance between the parties of the statement of such a matter, it seems to me that I must agree with my Lords that "terms" here in this section includes the length of the term. I cannot help thinking that it would be well if hereafter those who make these requests should express the term of years which they want and should not leave it to be gathered by implication, as it was left in this case. I do agree, nevertheless, that it is a necessary implication from the notice which was sent that a term of seven years was

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being asked for. Actually the tenant did not want seven years; he wanted 14, and, by giving evidence of that sought to say that what appears to have been a notice giving his proposals did not really give them and was therefore no effective request. I must protest against that method of construing a document. Such evidence is inadmissible, and, moreover, irrelevant. What a man has written he has written, and if what he has written be a request for a term of seven years, it does not become less his request because he did it by mistake. The person who receives it must read it according to its true construction and is entitled to receive it as such. I cannot think that it could be right to go behind a document of this sort and say: Well, as in the inmost heart of the writer he intended something else, he must not be taken to have meant what he wrote. If that were accepted, a state of chaos in regard to all documents would soon be produced.

As for the question of estoppel, I agree with what my Lords have said.

*Appeal allowed.*
*By agreement, judgment for possession to be given within six weeks.*

Solicitors: *Stanley Brent & Co.; Berry Tompkins & Co.*

M. M. H.

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## CHIPCHASE *v.* BRITISH TITAN PRODUCTS CO. LTD.

[1954 C. No. 135.]

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*Feb.* 9, 10.

Denning, Morris and Parker L.JJ.

*Factory—Common law duty—Relevance of regulations—Painter falling from working platform—Statutory regulations applicable to platform at slightly greater height—Whether court may consider common law duty independently of statutory requirements—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145), *reg.* 22 (*c*).

Regulation 22 (*c*) of the Building (Safety, Health and Welfare) Regulations, 1948, requires that "Every working platform from "which a person is liable to fall more than 6 feet 6 inches shall "be . . . (*c*) at least 34 inches wide if the platform is used for "the deposit of material."

A workman painting a factory was injured when he fell from a platform nine inches wide and six feet above the ground. In an action against his employers for negligence at common law:—

*Held*, that the court must decide the question whether the employers were in breach of their common law duty independently of regulation 22 (*c*); and that on the facts of this case they were not liable at common law.

*Franklin* v. *Gramophone Co. Ltd.* [1948] 1 K.B. 542; 64 T.L.R. 186; [1948] 1 All E.R. 353 considered.

Decision of Mr. Commissioner Edmund Davies Q.C. affirmed.

APPEAL from Mr. Commissioner H. Edmund Davies Q.C., Durham Autumn Assizes.

On November 5, 1953, the plaintiff, John Hugill Chipchase, was employed as a painter by the defendants, British Titan Products Company Ltd., at their factory, when he fell from a platform consisting of two pairs of steps and a plank nine inches in width, and suffered injuries. He brought an action against his employers, claiming damages for negligence at common law and/or breach of statutory duty under regulation 22 (*c*) of the Building (Safety, Health and Welfare) Regulations, 1948,[1] in that they had failed to provide the plaintiff with a platform of at least 34 inches in width, since he was working at a height greater than six feet six inches above the ground and thus liable to fall more than that distance, and the painting operation on which he was engaged was one to which the regulations applied. The employers by their defence claimed that the plank was only six feet above the ground and, accordingly, that there was no breach of statutory duty. They also denied negligence at common law and pleaded that the plaintiff's fall was caused by his own negligence or inadvertence.

At the hearing before the commissioner it was conceded for the plaintiff that the platform was only six feet above the ground, and the action proceeded on the issue of negligence at common law only, the plaintiff alleging, inter alia, that he had been required to work on a platform when it was manifestly unsafe for him to do so in that it was not wide enough; was not rigid enough; not secure in any way; and not suitable in any way. In his judgment on October 24, 1955, the commissioner said that the case had turned solely on one complaint: was the platform wide enough? He (the commissioner) must approach the issue as to negligence at common law independently of any regulation and decide whether it had been established that the employers had failed to take that degree of reasonable care for the safety of their workmen which was the standard prescribed by the common law. He held that it had not been proved to his satisfaction that a reasonably prudent employer would have seen to it that the plaintiff worked on a platform which was wider than the nine-inch plank on which he was in fact working; and he gave judgment for the employers.

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[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 22: "Every working platform from which "a person is liable to fall more than "6 feet 6 inches shall be— . . . "(*c*) at least 34 inches wide if the "platform is used for the deposit of "material;"

The plaintiff appealed.

[Note: The case is reported only on the relevance of statutory regulations to the duty at common law.]

*Norman Stogdon* for the workman. The commissioner misdirected himself in saying that the test as to negligence or no negligence should not take into account the fact that the defendants had only just escaped the breach of statutory duty under regulation 22 (*c*). It is a relevant factor for consideration, though the weight to be given to it is a matter for the court. If the regulation had laid down the maximum requirement it would not be relevant; but where, as here, it lays down the minimum requirement, the position is different. There is no authority directly on this point, but in *Franklin* v. *Gramophone Co. Ltd.*[2] there are useful observations by Scott and Evershed L.JJ.,[3] and Somervell L.J.[4] said that in considering the position at common law it was relevant to consider the regulations, and that in that case it was the regulation itself coupled with the evidence which he found established negligence. There have been other cases, too, in which a statutory duty covered only a particular class of persons but in which the court has found common law negligence if a person outside that class has been injured while doing similar work.

*John Thompson Q.C.* and *D. Tolstoy* for the employers. In *Latimer* v. *A.E.C.*[5] Lord Tucker[6] gave a warning against the tendency to increase the common law duty by approximating it to the statutory duty, and that passage was cited with approval by Morris L.J. in *Thomas* v. *Bristol Aeroplane Co. Ltd.*[7] *Franklin's* case[8] is distinguishable, for the plaintiff there was within the Grinding Regulations, 1925. It had never been decided whether a person was within an exemption under the regulations, and the only way in which the employers could be held liable in that case was at common law. The unsuccessful argument for the employers was that they were excused their common law duty, because the statutory duty was their whole duty; it was not argued that the statute must be looked at to see whether it was a case of "near miss" but to see the whole duty; and the court held that there was a separate common law duty and, though the employers were not liable for breach of statutory duty, they were liable at common law.

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[2] [1948] 1 K.B. 542; 64 T.L.R. 186; [1948] 1 All E.R. 353.

[3] [1948] 1 K.B. 542, 552, 560.

[4] Ibid. 558.

[5] [1953] A.C. 643; [1953] 2 All E.R. 449.

[6] [1953] A.C. 643, 658.

[7] [1954] 1 W.L.R. 694, 697–698; [1954] 2 All E.R. 1.

[8] [1948] 1 K.B. 542.

Further, in the present case, a double statutory duty was applicable to this platform, the first under the Building (Safety, Health and Welfare) Regulations, 1948, which arose in respect of a platform six feet six inches above the ground, and the second and different standard under section 26 of the Factories Act, 1937, applicable to a platform over ten feet above the ground, for this building was a factory. Thus the standard of the Act is lower than that of the regulations; and yet this plaintiff failed in his claim on breach of statutory duty even on the higher standard. The position would become ludicrous if it were to be said that the common law takes over where the regulations cease. One could not tell a jury all about all the statutory provisions which might apply when they had to consider only negligence at common law.

*Stogdon* in reply. *Latimer's* case [9] and *Thomas's* case [10] do not assist in the present case, for it is not sought to widen the common law, but only to have regard to the statutory duty as a factor for consideration. What a jury would have to be told is: "Here is the statutory regulation. It has not been broken, "but it has nearly been broken. What bearing has that on the "case, in view of all the other factors?"

Denning L.J. The plaintiff is a painter. In November, 1953, he was painting a factory; he got a pair of step ladders and a nine-inch plank, put them up in the ordinary way, and stood on the plank to do his work. He fell off and injured himself. Now he claims against his employers, saying that they were at fault at common law.

Mr. Stogdon argued that if the plaintiff had been working six feet six inches above the ground, he would, by virtue of regulation 22 of the Building (Safety, Health and Welfare) Regulations, 1948, have had to have planks at least 25 inches wide; and, indeed, as he had a paint bucket up there beside him, the planks would have had to be 34 inches wide. Mr. Stogdon agrees that this case is not within the regulations because the plaintiff was not working six feet six inches but only six feet above the ground; but he argues that, as it was so nearly within the regulations, the court ought to take the regulations into account and hold that there ought to have been a plank wider than nine inches.

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[9] [1953] A.C. 643.

[10] [1954] 1 W.L.R. 694.

I do not think that argument is correct. The commissioner was clearly right in saying that the common law claim must be considered independently of the regulations. Undue complications would be brought into these cases if, whenever the courts were considering common law obligations, they had to consider all the statutory regulations which nearly apply, but which in fact do not apply.

The question, therefore, is, as a matter of common sense, ought there to have been a wider staging? On all the evidence in the case the commissioner thought not, and I see no reason why this court should interfere with his decision. It is true that the foreman said that they used one plank only up to five feet ten inches: and if the height was over five feet ten inches there ought to be two planks. Although that witness was called for the defendants, the commissioner was not bound to accept every word the witness said. The commissioner was entitled to take into account the fact that the plaintiff selected the ladders and the plank himself and without complaint worked on it himself. It seems to me that the commissioner was quite right in holding that the employers had not been guilty of negligence, and I would dismiss the appeal.

MORRIS L.J. I am in full agreement with the judgment which my Lord has just delivered. It was submitted to us by Mr. Stogdon that the commissioner had wrongly approached the position which resulted from the fact that the particular regulation did not apply. I do not think that the commissioner approached the matter erroneously.

We were referred by Mr. Stogdon to the decision in *Franklin* v. *Gramophone Co. Ltd.*[1] That case showed that whether a factory owner is relieved of his common law duty by some regulation depends on the particular regulation in each case. The case also shows that the fact that the occupier of a factory has complied with all the requirements of regulations made under the Factory Acts, which may be of limited scope, will not necessarily absolve him from liability for negligence at common law if he has not fulfilled his common law duty of care for the health of the workmen employed by him. Somervell L.J. said[2]: "It is, "of course, relevant to consider the regulations and, in very "many cases, it would be difficult, if not impossible, to maintain "that an employer who had complied with regulations had been "negligent at common law. In this case, however, it is the "regulation itself, coupled with the evidence, which I find "establishes negligence. The regulation, by saying that the "appliances must be there if one or more people are employed "mainly in or incidental to the process, is an indication that "injury is to be apprehended by continuous proximity to an "abrasive grinder such as this."

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[1] [1948] 1 K.B. 542; 64 T.L.R. 186; [1948] 1 All E.R. 353.

In the present case, if the regulation was an indication of anything in particular, it was an indication of that which everyone knows, namely, that if you fall you may hurt yourself, and if you fall from a great height you may hurt yourself more than if you fall from a lower height. The commissioner was not unmindful of that, and all that he said was that he approached the case quite independently of any regulation; but he put to himself the test of considering whether the employer had failed to take that degree of reasonable care for the safety of his workmen which is required by the standards laid down at common law. I can see no error at all in that approach, and in all other respects as well I agree with the judgment delivered by the commissioner, which it seems to me was a wholly admirable judgment.

PARKER L.J. I agree.

*Appeal dismissed.*

Solicitors: *Tarry, Sherlock & King for Maurice Sutherland, Stockton-on-Tees; Gascoin & Co. for Cohen, Jackson & Scott, Stockton-on-Tees.*

M. M. H.

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[2] [1948] 1 K.B. 542, 558.

# DAVISON *v.* APEX SCAFFOLDS LTD.

C. A.

1956
*Jan.* 19, 20, 23.

Singleton, Jenkins and Hodson L.JJ.

[1953 D. No. 125.]

*Building—Safety regulations—Scaffold—Defective coupler—Breach of building regulations by employee—Use by employee of coupler not supplied by employers—Failure of employee to co-operate in carrying out Part II of building regulations—Employers thereby rendered in breach of regulations—Damages—Apportionment—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4, 7 *and* 12*—Law Reform (Contributory Negligence) Act,* 1945 (8 *&* 9 *Geo.* 6, *c.* 28), *ss.* 1 *and* 4.

*Building—Safety regulations—Duty on workman—Whether limited to acts to be done by him specifically—Building (Safety, etc.) Regulations,* 1948, *reg.* 4. *Statutory Duty—Contributory negligence.*

The plaintiff's husband was employed by the defendants as a chargehand scaffolder and at the time of his death was engaged in the erection of tubular scaffolding for the purpose of cleaning and repairing the roof of a station. Two other contractors were taking part in the work, and though each had a separate site on which to place his equipment, there had been some mixing. On the day in question the deceased used for the purpose of securing a transom to a standard a coupler which, as he knew, had not been supplied by his employers and was of a type not used by them, but which apparently had been used in a bay that had previously been demolished. The coupler proved to be defective and in consequence the scaffolding collapsed and the deceased fell to his death.

The plaintiff claimed damages from the defendants, alleging that they were in breach of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, and also negligence at common law. The defendants admitted that in the circumstances they were in breach of regulations 7 and 12. The trial judge absolved the deceased of contributory negligence and awarded the plaintiff £6,298 10s. damages:—

*Held* (Hodson L.J. dissenting), (1) that the deceased man was himself in breach of regulation 4, in that he had failed to co-operate with the defendants in carrying out the requirements of Parts II and VII of the regulations; (2) that it was his breach of statutory duty which had brought about the breach by the defendants of regulations 7 and 12; (3) that although the deceased was not responsible for the presence of the defective coupler in the defendants' equipment he had made use of it and therefore could not be acquitted altogether of negligence at common law; (4) that, accordingly, the damages should be reduced by 20 per cent.

*Per* Hodson L.J. (dissenting). The statutory duty imposed by regulation 4 on "an employed person to comply with the requirements of such regulations as relate to the performance of an act by him" was directed only to cases where under the regulations acts were to be done by specific employees.

Judgment of Ashworth J. varied.

APPEAL from Ashworth J., sitting at Manchester Assizes.

The plaintiff's husband, Leslie Davison, aged 27 years, was a chargehand scaffolder employed by the defendants, Apex Scaffolds Ltd., a Manchester firm. At the time in question work was being done to clean and repair the roof of Exchange Station at Liverpool, and the defendants were one of three firms engaged in erecting scaffolding, upon which the workmen of other contractors would have to work. The material required for carrying out the defendants' contract was, after selection and careful examination, sent from the defendants' stores at Manchester to Liverpool, and thereafter the work was put in charge of a chargehand. The work had been going on since about the end of 1951, and on February 4, 1953, Davison was the responsible chargehand. The particular scaffolding on which the defendants were engaged was not being built up from the ground, but was being suspended from the rafters or roof of the station. The scaffolding was being constructed in bays, each 11 feet in length but varying slightly in width, and it was the practice of the defendants, as the need arose, to dismantle a bay or bays which were no longer required and to use the equipment for the purpose of forming an additional bay or bays. It was while one such additional bay was being formed that the deceased, Davison, met his death. The defendants, to the knowledge of Davison, used only a coupler known as the "little giant," but in the course of the prolonged work a number of "stranger" couplers had become mixed with the defendants' equipment. One such "stranger" (described as the P.3), which had apparently come from a dismantled bay, was on the day in question used by Davison to couple a transom to a vertical standard. Davison securely fastened the coupler to the transom but, unknown to him, the bolt in the other clip was 5/16ths of an inch longer than the bolt already fastened. In consequence the end of the bolt came up against the transom and, although it was apparently tightly screwed, it failed to tighten the clip around the vertical standard, with the result that it slipped down the upright, a part of the bay collapsed and Davison fell some 30 feet to the ground and was killed.

The plaintiff brought an action for damages against the defendants on behalf of herself and her three children, alleging that her husband's death was caused through the defendants' negligence or breach of duty under the Building (Safety, Health and Welfare) Regulations, 1948. Ashworth J. assessed the damages suffered by the plaintiff at £6,298 10s. and awarded her the whole of that sum.

The defendants appealed. They admitted that they were in breach of regulations 7 and 12,[1] but contended that the deceased man was also in breach of regulation 4,[1] and had by his own fault brought about the accident and that, therefore, the damages should be apportioned.

*D. J. Brabin Q.C.* and *A. M. Maguire* for the defendants. The defendants having admitted that they were in breach of regulations 7 and 12, owing to the fault of the deceased workman, the judge deemed it unnecessary to consider the other regulations of which it was originally said that the defendants were in breach. The defendants only became in breach of a statutory duty by reason of the deceased workman's use of a defective coupler which had not been supplied by them. In so doing the workman failed to co-operate with his employers in carrying out the safety regulations and was himself in breach of his statutory duty under regulation 4. The duty to co-operate involved helping in the carrying out of the regulations, and if a chargehand on setting up scaffolding used equipment which did not belong to his employers and was not supplied by them he was not co-operating. The accident was caused by the workman's own fault. He knew his employers used only the coupler called the "little giant" and never issued any other kind. He was guilty of contributory negligence and the damages should be apportioned under sections 1 and 4 of the Law Reform (Contributory Negligence) Act, 1945. [Reference was made to *Johnson* v. *Croggan & Co. Ltd.*[2]]

*Fenton Atkinson Q.C.* and *J. L. Addleshaw* for the plaintiff. The words in regulation 4 "comply with the requirements of such "regulations as relate to the performance of an act by him" are not of general application but apply only where a regulation does impose a duty on a particular man to do a particular job. For instance, regulation 34 (1) (*c*), which relates to lifting appliances and provides for inspection at least once every week by the driver or other competent person.

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[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 4: ". . . It shall be the duty of every "person employed to comply with the "requirements of such regulations as "relate to the performance of an act "by him and to co-operate in carrying out Parts II and VII of these "regulations . . ."

Reg. 7: "Construction and "material.—(1) Every scaffold and "every part thereof shall be of good "construction, of suitable and sound "material and of adequate strength "for the purpose for which it is "used."

Reg. 12: "Support and stability "of scaffolds.—(1) Every scaffold "shall be securely supported or suspended and shall where necessary "be sufficiently and properly strutted "or braced to ensure stability and, "unless it is properly designed and "constructed as an independent "scaffold, shall be rigidly connected "with the building."

[2] [1954] 1 W.L.R. 195; [1954] 1 All E.R. 121.

[SINGLETON L.J. I think the purpose of the legislature is to put everyone under a duty.]

[HODSON L.J. You have to consider that these regulations are not confined to civil actions. They are penal regulations.]

[SINGLETON L.J. If a chargehand saw something which was defective and used it, would he not be guilty of an offence? Otherwise you cannot carry out the regulations.]

If a chargehand knew that the thing was defective he would be in breach of the regulations, but the regulations do not put a scaffolder under a duty to examine every part of the scaffold. The defective coupler had, on the judge's finding, been used on other scaffolding of the defendants which had been dismantled, and the defendants were therefore in breach of the regulations. There is no case in the books where a workman taking reasonable care has been held to be in breach of a statutory duty under these regulations by reason of some alleged defect which care would not have discovered.

SINGLETON L.J. Leslie Davison was a chargehand scaffolder employed by the defendants, Apex Scaffolds Ltd. He was killed on February 4, 1953, when scaffolding upon which he was working collapsed and he fell some 30 feet to the ground. He left a widow and three young children. He was 27 years of age. His widow brought this action against the defendants, alleging that her husband's death was caused through their negligence or through breach of statutory duty. The action was heard before Ashworth J. at Manchester in October, 1955. He held that the action succeeded, and he gave judgment for the plaintiff for £6,298 10s. damages, the damages being apportioned between the widow and the children. The defendants appeal against that judgment. It is submitted on their behalf, first, that they were entitled to succeed in the action and that judgment ought to have been entered for them and, secondly, that in any event the deceased man was responsible to some extent for the collapse of the scaffold, and for his death, and that the damages ought to be apportioned accordingly.

[His Lordship stated the facts, read the description by Ashworth J. of the work which was being executed by the defendants and continued:] The work at Exchange Station, Liverpool, had been in progress for more than a year. It is common ground that when the material was chosen by Mr.

Naylor (an official of the company) along with Davison, the material selected was suitable in every respect. The employers took care in the selection of their material. They sent all that was necessary, and thereafter for a period the work—that is the erection of the scaffolding—and the material were in the hands of Davison, the chargehand. There were changes in chargehands. Apart from Davison there were two others, each of whom from time to time or at some time was in charge of the work and of the material. A place was provided at the far end of a platform on which the defendants' material could be stored. It so happened that fairly near that place was another place assigned to other scaffolding contractors and it may well be that material of one company became mixed with the material of another company. I am not sure how long Davison was chargehand during the 13 months or so before the accident. He began as chargehand when the work started and was chargehand at the time when he met with his death. He had been working elsewhere. He returned to this duty about Christmas of 1952, and had been five or six weeks chargehand before he was killed. It was usual for the chargehand and the two men who were with him to use material from a part of the scaffolding which had been taken down in order to erect a new part, and that was what they were doing when the accident happened.

The double coupler which had the bolt which was too long did not belong to the defendant company. It had not been taken there from the defendants' premises. It belonged to other contracting scaffolders and was of quite a different make. That was easily seen: it was heavier and there was a difference in the bolt. The couplers called "little giants," which were normally used by the defendants, had a bolt which was fixed, and the tightening of the clip is brought about by the turning of the nut at the top of the bolt. When that is done completely and properly, the clip is firmly held. The coupler which was defective was of a kind in which the whole of the bolt is moved when the top is turned, and when the bottom end of it reaches the tubular part, the nut, if the bolt is of the proper size, ought to be tight up against the clip. If a workman is in a difficult position when screwing it up, it is not so easy for him to tell that the nut is up against the clip as it would be if he had turned just the nut alone, as he would do in the case of the "little giant." The two things were of different type.

After this accident a check was made and it was found that there were about 20 of these "foreign" or "stranger" clips among the defendants' material, and there were about nine in one bay. There ought to have been none. The defendants' workmen ought to have kept to the defendants' material. It is not easy to say who was responsible for the change. There were three different chargehands during the 13 months or so and there is nothing to show when the material became mixed. There is no doubt that the defendants had supplied proper materials. There was produced a list of the material which was taken. It was the duty of the chargehand at first, and in the last stage the duty of Davison, to return to the defendants any material or stores which became defective when they would be replaced. The list shows the changes which took place from time to time. It appears to me from what I have heard and from the list which was produced that the defendants took care in regard to the supply of material; again it was agreed that when he was working on that work, Davison, as the chargehand, was responsible for the erection of the scaffolding and for the material. If any material was found to be wrong, it was his duty to take it out of use and to return it to his employers if the fault was something which could not be repaired upon the site. Ashworth J. was satisfied that the only couplers included in the equipment taken over to Liverpool by the defendants in January, 1952, were of the type known as the "little giant," and he was satisfied that the "little giant" differed materially in weight and in form from the coupler P.3, which was the defective coupler.

The plaintiff's claim was considered chiefly on the allegation that there was a breach (or breaches) of the Building (Safety, Health and Welfare) Regulations, 1948. Regulation No. 4 lays down the obligations under the regulations. It provides that "it shall be the duty of every contractor and employer of "workmen who erects or alters any scaffold to comply with such "of the requirements of regulations 5 to 30 as relate to the "erection or alteration of scaffolds having regard to the purpose "or purposes for which the scaffold is designed at the time of "erection or alteration. . . . It shall be the duty of every "person employed to comply with the requirements of such "regulations as relate to the performance of an act by him and "to co-operate in carrying out Parts II and VII of these regula- "tions and if he discovers any defect in the scaffolding, plant "or appliances to report such defect without unreasonable delay "to his employer or foreman, or to a person appointed by the "employer under regulation 98."

A number of breaches were alleged on behalf of the plaintiff. The defendants admitted that they were in breach of two regulations and the trial judge did not think it necessary for him to consider other regulations. Regulation 7 is one of which it is admitted that the defendants were in breach. It reads: "Every "scaffold and every part thereof shall be of good construction, "of suitable and sound material and of adequate strength for "the purpose for which it is used." I think that that is the only part of the regulation to which I need refer, for it is that part which the defendants admit they broke. The scaffold was not of good construction, of suitable and sound material. The coupler which was used was defective by reason of the fact that the bolt was 5/16ths of an inch too long. Regulation 12 is the other one of which the defendants admit breach. [His Lordship read regulation 12 and continued:]

While the defendants admitted that they were in breach of both those regulations, it was claimed on their behalf that the same default applied to Davison, the chargehand, for, it was contended, the whole of the work was entrusted to him when he was chargehand and he was under a duty laid down at the end of regulation 4. He was a person employed and it was his duty to comply with the requirements of such regulations as related to the performance of an act by him, and to co-operate in carrying out Part II of the regulations, in which both regulation 7 and regulation 12 appear. Mr. Brabin submitted that when Davison was erecting the new bay, he was performing an act, within the words at the end of regulation 4; that it was his duty to comply with the regulations and it was his duty, in other words, to see that that which he was erecting was in accordance with the requirements of regulation 7 and regulation 12. Furthermore, Mr. Brabin submitted that there was a duty upon Davison to co-operate in carrying out those regulations, both of which appeared in Part II of the regulations. He added that the defendants had performed their duty in selecting suitable material and in sending suitable material to Liverpool, in putting an experienced chargehand, as Davison was, in charge of the work, and in instructing him to return any material which became unfit for use. The duty to co-operate involves helping in the carrying out of the regulations; and if a chargehand, in setting up scaffolding, uses something which does not belong to the defendants and which has not been supplied by them, he is not co-operating in helping them to perform their statutory duty, but is in fact making it impossible for them to do so. It is said on behalf of the defendants that it was the duty of the chargehand, whoever he was, upon this work to use the defendants' material and stores, and theirs only, and that that is one object of the provision that the person employed must co-operate in carrying out the parts of the regulations to which that part of regulation 4 applies.

I should add that the claim was based on negligence, too, and that there was an answer put forward on behalf of the defendants that Davison himself was guilty of contributory negligence. There is one further plea in the defence to which I ought to refer. In paragraph 4 of the defence it is alleged: "The defendants had delegated to the deceased the duty of "selecting safe and suitable materials for the construction of "scaffolding from the gear issued to him by the defendants and "in his control. Wherefore if there was any breach of statutory "duty such was the breach of statutory duty of the deceased "and not of the defendants." I do not understand that plea upon the facts of this case. The deceased was a chargehand, one who was in charge of the work in its early stages and again for some five or six weeks before he was killed. There was no delegation of duties under the statute by the defendants to Davison. He was the man in charge of the work. He had been supplied with materials. There cannot often be delegation of duties such as these. In any event, upon the evidence I am satisfied that there was no delegation in fact or in law. That does not mean that there is nothing in paragraph 4 of the defence, for it may be that if both the defendants and Davison were charged with duties under the regulations, and if both were at fault, still the defendants might succeed to some extent on their claim that the damages should be apportioned or decreased according to the measure of Davison's responsibility.

It is necessary that I should say a little more about the facts. It is clear that the materials, including the defective coupler, had been used upon a bay which was dismantled. The materials from that bay were taken for use in the construction of the bay on which Davison was engaged at the time of his death. It may be said that it would be natural for him to use a coupler which did not belong to his employers, but which was taken from another bay. It ought not to be so, for a chargehand knows of the Building Regulations. He knows that he may put some liability, civil or criminal, upon his employers if he uses material which they have not had an opportunity of inspecting; and he must know, so I think, that if he did that, he might be involving himself in some criminal responsibility, some offence against the regulations. But, over and above that, he is engaged on work of a dangerous character. He is working at a considerable height above ground. His own life is at risk, and so are the lives of other people who are on the ground below. If a chargehand knows that his employers have taken care to select material for him, and if he knows that they have an arrangement by which he has to send back any material which becomes defective, he ought at least to keep to the use of their material and not to use someone else's material.

When he is up on planks some height above ground, he has not full opportunity of examining everything which he uses. He is at a disadvantage. It may not be very easy to see; when he is screwing up the bolt or nut, he often has some portion of the erection in between him and it. The workman, be he chargehand or an ordinary scaffolder, ought not to be lightly found guilty of negligence in failing to find some defect such as the defect in this case. On the other hand, if he thinks it right to use something not provided by his employers, surely he ought to take the greater care to examine it before using it. Herein lies the importance of keeping stores of different contractors apart and separate. That, I believe, was the duty of the chargehand. There had been two other chargehands; couplers had got mixed, and Davison, finding that this coupler had been used on one bay, used it on this bay, with a result fatal to himself. I do not think that he ought to have done so. Having said that, I would add that I do not think that he can be blamed for not seeing the defect. One other thing about the double coupler. It might have been put in one of four different positions. If it had been in any one of three, other than the one in which it was placed, the fact that the bolt was too long would not, or might not, have led to an accident. It was most unfortunate in that sense.

In the course of the evidence before Ashworth J. the defendants, in support of their plea of contributory negligence on the part of the deceased, relied upon two matters. First, they said that when this kind of coupling is being done, the upright ought to be secured first. Someone was not very sure that it applied to this class of work. It was said that it was the rule when one was erecting a scaffold from the ground, because a man who was erecting it would have to go up on to that which was erected and, if the upright was secured first, one could not get a fall such as happened in this case. It was the drill to secure the upright first. If that had been done in this case, the accident would not have happened; but for some reason which I do not wholly understand it is said that that is not of the same importance when one is putting up a scaffold which is suspended from the roof. I do not know why it should not be of the same importance. The drill is for safety reasons and, though I recognize that it is not a matter on which one can express any firm opinion, I would say upon the evidence that the same drill ought to be applied whenever one is erecting scaffolding. It would have prevented this accident. The next point the defendants raised is that, whenever a coupling of this kind is put on, there ought to be another coupling—a single coupler, I suppose—put just below as a safety measure to prevent a slipping of the double coupler such as happened. If that had been done, there would have been no accident.

Those two allegations of contributory negligence were set up by the defendants on the trial, and for both of them I should think there is considerable foundation; but they were not pleaded. Ashworth J., who was satisfied that there were breaches of statutory duty, said: "In my judgment, therefore, "the claim based upon a breach of statutory duty succeeds and "in so far as the claim at common law in substance covers the "same ground, it succeeds, too." He did not find any other negligence, apart from that which is embraced in the breach of regulation 7 and of regulation 12. That is why I have thought it right to decide this case really upon the claim for damages for breach of statutory duty.

A further matter to which I ought to draw attention is that if a chargehand uses material other than his employers' material, when he knows that his employers have taken great care to pick out certain material for him, and to keep a list of it, he is depriving them of their chance maybe to avoid a breach of the regulations. He is using something which they have not inspected. He cannot inspect it to the same degree if he is up the scaffold. I do not think that he ought to use it. If he does, he is failing to co-operate in performance of the regulation, contrary to regulation 4.

There is much to be said for the fact that one must not lightly blame a workman who is employed on difficult and dangerous tasks, as this man was. On the other hand, a man who has been brought up to a regular routine for safety reasons ought to follow it. Against that, as Hodson L.J. pointed out during the argument, the man is dead. You cannot have his explanation.

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If I could think of any explanation, I would gladly adopt that line, but I cannot. It appears to me that one must look at the whole of the picture. Either of two courses adopted would have prevented this accident: one is the drill or routine of securing the upright first: the second is an additional coupler. Davison was using something which he ought not to have used. I have formed the opinion that in so doing he was himself in breach of regulation 4. He was not complying with regulation 7 and regulation 12, in that at the time he was performing an act of setting up a scaffold and he used something which meant that there was an offence against each of those regulations. Over and above that, I would say that if a chargehand knowingly uses someone else's material when his employers have provided him with all the material, so as to put themselves within the regulations, he, in using material which turns out not to be suitable, is failing to co-operate in carrying out the regulations.

Thus it appears to me that the deceased was in breach of the regulations. I have tried to look at his position as broadly and as fairly as I can. No one would lightly find a man who is dead guilty of breach of regulations or guilty of negligence. The employers had done their part. They recognized him as an experienced chargehand and they gave him charge of the work and of the material and stores. He at least (and it may be other chargehands as well) was content to use someone else's material. That probably arose through the material becoming mixed with other people's stores. It ought to be part of the chargehand's duty to avoid that. He ought not to use someone else's material if it can be avoided, and it could have been. The other chargehands, or one of them, may have been equally to blame, or even more so, in using this coupler or other couplers belonging to other contractors at an earlier stage. When that began, I do not know, but upon Mr. Naylor's evidence there were nine wrong couplers found in one bay and 20 altogether. If that is allowed, mistakes may happen.

The employers have no knowledge of what is happening from day to day. If Davison thought it right to use someone else's coupler, he ought to have been very careful about it. I dare say a hand upon the clip, after he had thought he had screwed it up, would have shown that all was not well. I would not expect him to see, when he was up on the stage, that the bolt was too long; but, if he was using someone else's coupler, was there not all the more need to adopt the ordinary safety drill of an additional coupler? I am not thinking so much of contributory negligence as of the duty under the regulations. And the employers might have taken other steps. If they knew that there were other contractors working upon that site, others who were engaged upon a somewhat similar type of work, they ought to have given instructions "Keep your materials separate; use "only ours," though I think under the regulation it was a matter which a chargehand ought to have known himself.

On the whole of the facts of this case, and giving full consideration to the arguments on both sides, I find it impossible to say that there was not some responsibility upon Davison in respect of the accident which most unfortunately befell him. Thus it becomes necessary to consider the terms of sections 1 and 4 of the Contributory Negligence Act, 1945. Under section 4 the word "fault" in the Act means "negligence, breach of "statutory duty or other act or omission which gives rise to a "liability in tort or would, apart from this Act, give rise to the "defence of contributory negligence." The material part of section 1 is: "Where any person suffers damage as the result "partly of his own fault and partly of the fault of any other "person or persons, a claim in respect of that damage shall not "be defeated by reason of the fault of the person suffering the "damage, but the damages recoverable in respect thereof shall "be reduced to such extent as the court thinks just and equitable "having regard to the claimant's share in the responsibility for "the damage."

I think it would be right if in this case this court held that the share of responsibility of Davison for this accident was one-fifth, or 20 per cent. of the total. I recognize that in so saying I am differing to some extent from Ashworth J., who gave this case most careful consideration. I would allow the appeal to the extent of reducing the damages by 20 per cent.

JENKINS L.J. I agree. The plaintiff's case was based primarily on breach of the statutory duty imposed by the Building Regulations of 1948. In the course of the hearing before Ashworth J., the defendants admitted that regulations 7 and 12 of those regulations had not been complied with. They raised, amongst other defences, the allegation that the defendants' statutory duty in this matter had been delegated to the deceased and accordingly that the plaintiff could not maintain a claim against the defendants for breach of the duty so delegated. I entirely agree with my Lord that, whatever the precise extent of the doctrine of delegation in this connexion may be, no case of delegation is here made out on the facts.

So far, then, the matter stands thus. The defendants admitted that they had not complied with regulations 7 and 12, and the statutory duty to comply with the regulations is an absolute duty. It follows that, apart from the effect of the latter part of regulation 4, to which I will later refer, the plaintiff would be entitled to succeed irrespective of any negligence on the part of the defendants, subject, of course, to such reduction, if any, in the damages recoverable as it might be proper to make on account of any contributory negligence on the part of the deceased. But the latter part of regulation 4 of the Building Regulations of 1948 provides as follows: "It shall be the duty "of every person employed to comply with the requirements of "such regulations as relate to the performance of an act by him "and to co-operate in carrying out parts II and VII of these "regulations and if he discovers any defect in the scaffolding, "plant or appliances to report such defect without unreasonable "delay to his employer or foreman, or to a person appointed by "the employer under Regulation 98."

Regulations 7 and 12, non-compliance with which was admitted by the defendants, both occur in part II of the regulations. It should be noted that the passage from regulation 4 which I have just read had no exact counterpart in the earlier regulations, namely, the Building Regulations, 1926–1931, which were replaced by the regulations of 1948. The corresponding provisions of the earlier regulations contained references to co-operation, but no provision comparable to the provision in regulation 4 that every person employed is "to comply with the "requirements of such regulations as relate to the performance of "an act by him." Those words are new and they substantially increase the ambit of this part of regulation 4 as compared with earlier provisions concerning the duty of employees.

Mr Atkinson, for the plaintiff, invited us to hold that the words "to comply with the requirements of such regulations as "relate to the performance of an act by him" should be construed as limited to the provisions in the regulations under which particular employees are required to do particular acts, and he instanced regulation 34 (1) (*c*). That regulation relates to lifting appliances, and paragraph (1) (*c*) of it provides: "Every lifting "appliance and every part thereof . . . shall . . . (*c*) as far as "the construction permits be inspected at least once in every "week by the driver, if competent for the purpose, or other "competent person"; and, says Mr Atkinson, regulation 4 is in this respect satisfied by provisions of that sort. I see no reason for placing that limited construction upon the wide terms of this provision of regulation 4.

In my judgment, the deceased was performing an act within the meaning of this provision when he proceeded to erect the particular piece of scaffolding out of which this claim has arisen and incorporated therein the defective coupler P.3. In my view, he was then performing an act and regulations 7 and 12 related to the performance of that act by him. [His Lordship read regulation 7 (1) and continued:] In my view, in relation to any person employed who is erecting a scaffolding, that regulation must, within the meaning of regulation 4, relate to the performance of an act by him, namely, the erection of a scaffolding. Similarly with regulation 12 (1): "Every scaffold shall be "securely supported or suspended and shall where necessary be "sufficiently and properly strutted . . ." It follows that the deceased was, in my opinion, in breach of the concluding provision of regulation 4, in that he failed to comply with the requirements of regulations 7 and 12.

So far one has reached this position as regards statutory duty: the deceased and the defendants are both in breach of their statutory duty under the regulations, and the defendants' breach of the regulation had been brought about by the deceased's breach; that is to say, the deceased, by his own act of incorporating the faulty coupler into the scaffolding, at once committed a breach of his own statutory duty and put the defendants in breach of theirs. In these circumstances, I cannot for my part see how the plaintiff can succeed merely on proof of the defendants' breach of statutory duty. She cannot, in my view, be heard to say: "I claim damages because my husband was killed "through his own breach of statutory duty, and I claim those "damages on the ground that his breach of statutory duty "automatically brought about a breach of statutory duty by the "defendants." I cannot think that that would be a right conclusion. In my view, it must be necessary for the plaintiff, in order to succeed, to go on and prove that the breach of statutory duty—that is to say, in substance, the incorporation of P.3 in the scaffolding—was in some degree due to the defendants' negligence over and above their statutory responsibility for a mere innocent breach of the regulations. The inquiry upon which one must embark thus does not greatly differ from the inquiry necessary in a case where the issue is one of negligence or no negligence at common law.

Now, very briefly as to the history of this matter, the deceased was assigned to this work early in 1952, was then away for a time and returned. There is no doubt on the evidence that in the first instance the defendants, in accordance with their usual practice, took the necessary gear for the scaffolding to be erected at the Exchange Station from their store in Manchester, and it was all gear which had been properly examined and put into thoroughly good order; but it is clear that, by the time the deceased returned, a number of P.3 couplers, which were not a kind of coupler used by the defendants and none of which were, as the judge found, provided by the defendants for use on this job, had become mixed with the defendants' gear. Moreover, as the judge found, some of these couplers, including the defective one which caused the accident, had actually been incorporated in the scaffolding. The judge concluded on the evidence that the part of the scaffolding from which the defective coupler P.3 was taken had been erected before the deceased returned to this job. Mr. Brabin, for the defendants, criticized the evidence about that; but I think the judge was warranted in arriving at that conclusion by the evidence of Davis (one of the deceased's two workmates on the job and working under him), who said that at the time of the accident the scaffolding could have been up two or three months; and by Mr. Naylor, who gave a similar answer, and a further answer by Davis, who was asked whether the whole of the scaffolding gear was kept on a mat. He answered "Everything was erected when I arrived on the job," which I take to mean that all the parts which had been taken down to the station for the job had been built into the system of scaffolding when Davis arrived, as he did before the deceased's return to this job. The day before the accident the deceased and the two men working with or under him (that is to say, Davis and Lawrence) set about dismantling a bay of this scaffolding to erect it further along the station. What they did was to take down the scaffolding that was no longer required where it was, pass it along at the height of about 30 feet from the ground, put it on a "mat" or platform at that level, and use it straightaway for erecting the further bay of scaffolding at the point where it was next required. So P.3 came to the hands of the deceased as a piece of scaffolding which had, during his absence from the job, been taken into use by the defendants and actually incorporated in the defendants' own scaffolding. The deceased took this P.3 coupler and incorporated it in the new scaffolding, with the tragic consequence that he fell to his death.

Who, then, was to blame for the use of the P.3 coupler? It was put into place on the scaffolding, and as the deceased no doubt thought properly secured, by the deceased's own hands. So, in that sense, he was the author of his own misfortune. But the matter does not rest there. If the deceased had, at all material times, himself been in charge of these operations, if he had been responsible for picking up and taking into the defendants' stock or gear the P.3 coupler, it seems to me that it would be difficult to arrive at any other conclusion than that the deceased was wholly to blame for the breach of statutory duty and for the accident which ensued; but that is not what happened. At the time the deceased returned, according to the judge's finding, which I accept, P.3 was already in use by the defendants. It seems to me that that makes a very material difference. The deceased might well assume that if it had been used before it could be used again and that there was no reason to suppose that its condition had deteriorated from the time it was put up; so that he was to that extent warranted in using P.3. It was not a stray piece picked up off the platform. It was a piece which came out of the defendants' own scaffolding; and it appears clear that the usual practice, when moving the scaffolding, was to take a bay down where it was no longer wanted and use the same pieces to re-erect in another place. But someone else was responsible for the presence of P.3 amongst the defendants' gear, and in particular amongst the defendants' gear actually in use in their scaffolding. It seems to me that its introduction in the first instance was really the main cause of this accident.

On the facts as found by the judge, the conclusion seems to me to be irresistible that before the deceased's return to the job, while other chargehands were supervising operations, P.3 was picked up by somebody and taken into the defendants' stock, and it seems to me that P.3 must have been incorporated in the defendants' scaffolding under the supervision of the chargehands then supervising operations. It would have been possible for P.3 to have become mixed with the defendants' other gear through the officious or mischievous act of some third party, but it seems to me that the chargehands then supervising operations must have known (or, if they did not know, they ought to have known) of the presence of this alien piece, for it could not have been built into the scaffolding without their knowledge if they had been supervising operations properly.

Accordingly, there was, as it seems to me, negligence on the part of the deceased's immediate predecessors in charge of this operation and this was the main cause of the accident. On the other hand, the deceased himself was a chargehand and he had in fact been in charge of the defendants' operations at this station from the Christmas preceding the date of the accident; that is to say, from Christmas 1952. I think that he and every other chargehand at any time concerned in this matter must have known that the defendants' system, on which they relied for the purpose of ensuring that their gear was safe and sufficient gear, was that their own gear provided out of their own store in Manchester and none other should be used. The deceased was thus, as I think, to some degree at fault in making any use at all of P.3. On the other hand, I think that his fault is to a great extent mitigated by the circumstance that he did not himself pick up P.3 and mix it with the defendants' gear; it came to him as apparently part of the defendants' gear and being used as such. Thus, although it is clear that he would appreciate that this was a very different type of coupler from the "little giant," he may have thought that there could not be anything wrong with it, that it must be all right, otherwise, it would not have been used in the old scaffolding.

It is said that the deceased ought to have observed the defect in P.3; but I cannot agree that he can be fairly charged with any appreciable degree of negligence for failing to detect that fault. P.3 was a perfectly good coupler in every respect, so far as its design and apparent condition were concerned. The threads were on the screws. The screws were revolving freely in their sockets. The bolts were not bent. There seemed to be nothing wrong with it, and in fact it was agreed on all hands that there was nothing wrong with it except that one of the bolts was too long. It was 5/16ths of an inch longer than the other and in fact too long to fit this appliance properly, so that, in the circumstances, it would or might fail to give a tight joint when, to all appearance, the bolt had been screwed right home. Thus, I cannot regard the deceased as being to any serious extent to blame merely because he failed to observe that difference. It seems to me that his fault is the more general one, that if he had pursued a counsel of perfection he ought not to have used P.3, which he knew, or should have known, was not one of the defendants' appliances.

That, in substance, leaves the two other matters relied on by the defendants as constituting contributory negligence. One is failure to observe the usual "drill" of tightening the vertical coupler first. It is agreed that this peculiar fault in P.3 was such that if the vertical coupler had been tightened first, a firm joint would have been obtained, notwithstanding that one of the bolts was too long. Speaking for myself, I am not disposed to regard that as amounting to contributory negligence. It was described as a drill which was laid on as a matter of general practice for safety reasons, but I do not think the evidence goes so high as to show that in all circumstances it can definitely be said to be wrong practice not to tighten the uprights first and, as was pointed out by one of the witnesses, it would be necessary in this particular construction to adjust the transom for height, so as to get it level at both ends before finally tightening the bolt. As the judge pointed out, this matter was not clearly or specifically pleaded, and that fortifies me in the view I have formed, in agreement with him, that this should not be held to amount to contributory negligence.

The other matter (again not pleaded by the defendants) was the use as a safety precaution of a second coupler clipped to the scaffolding member below the one effecting the junction between the vertical and the horizontal members. Here again, I agree with the judge that in this respect the deceased should not be held guilty of contributory negligence.

Those, I think, are in substance all the matters alleged against the deceased by way of contributory negligence. Having considered all the circumstances as well as I can, while I acquit the deceased of negligence in the two respects I have last mentioned, and also acquit him of negligence on the specific matter of his failure to detect the difference in length of the bolt, I cannot wholly absolve him from blame, for this accident would never have happened if he had rejected, as, in my view, he should have done, the P.3 coupler as a coupler not supplied by the defendants and therefore not one which had been subjected to the defendants' usual precautions in the way of examination and overhaul. He may not have noticed, and he may be excused from not having noticed, the particular defect, but he must have noticed that this, so far as the defendants were concerned, was an unauthorized coupler which might be defective in one way or another and which ought not to be used.

In all the circumstances of the case, it seems to me that justice will be done if, as my Lord has proposed, the amount of the damages is reduced by 20 per cent., on the ground of contributory negligence by the deceased; and, to that extent, I would allow the appeal.

Hodson L.J. If the matter had rested with me, I would have dismissed this appeal and allowed the judgment of Ashworth J. to stand. The plaintiff's claim depended on the breach of Building Regulations and, for the sake of simplicity, I think it sufficient to refer to regulation 7, which provides: "Every scaffold and "every part thereof shall be of good construction, of suitable and "sound material and of adequate strength for the purpose for "which it is used." The accident happened because the material, or part of the material, was unsuitable, in that the coupler which was used to join the vertical standard and the horizontal transom had a bolt which was 5/16ths of an inch longer than the corresponding bolt on the other coupler. The result was that the point of the long bolt came up against the transom when the coupler was being tightened round the standard and, instead of the coupler being tightened, the bolt merely bore hard against the transom without the coupler being tightened, and, when weight was put upon the transom, the coupler slipped down the standard, and the deceased fell and was killed.

One of the matters which was raised in the defence I can deal with shortly. The defendants said that if there was any breach of statutory duty (which is now admitted), the defendants had delegated to the deceased the duty of selecting safe and suitable materials for the construction of the scaffolding. I agree with my Lords that there is no evidence here which could justify any finding of delegation. In support of that proposition I would refer to the decision of this court in *Manwaring* v. *Billington*,[1] where, although the case was decided on another ground in favour of the defendants, the majority of the court said that, in their view, in order that there might be a delegation of a statutory duty, it must be made clear that it is such a duty that is being delegated and that it is not a mere instruction that is being given. The headnote, I think, correctly summarizes what they said when it uses these words: "a mere instruction to a workman as to "the method of carrying out his duties does not constitute the "delegation of a statutory duty relating to that matter."

There being no delegation here, the defendants cannot succeed on that ground; but they have relied upon breach of regulation 4, and have alleged against the plaintiff contributory negligence by the deceased. Regulation 4 is part of the Regulations of 1948, which succeeded the Regulations of 1926–1931. The later regulation has included some words which do not appear in the regulations in their original form. The duty of the employee to co-operate was in the original regulations, but there are additional words. I must read the whole of the concluding paragraph: "It "shall be the duty of every person employed to comply with the "requirements of such regulations as relate to the performance "of an act by him and to co-operate in carrying out Parts II "and VII of these regulations and if he discovers any defect in "the scaffolding, plant or appliances to report such defect without "unreasonable delay to his employer or foreman, or to a person "appointed by the employer under regulation 98."

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[1] [1952] 2 T.L.R. 689; [1952] 2 All E.R. 747.

The question of whether or not the employee co-operated in carrying out Parts II and VII was investigated by the judge, for the defendants said that the deceased man had not co-operated. Parts II and VII are concerned with obligations which fall prima facie upon employers. Part II deals with scaffolds and means of access, and Part VII with miscellaneous provisions of all sorts—fencing of machinery, the care and the maintenance of mechanically propelled vehicles, the handling of explosives, protection from falling material, lighting, safety nets, and other matters. For my part, I should have thought that the phrase "It shall be "the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act "by him" was directed to those cases where in the regulations actions were to be taken by specific employees, as in the example to which Mr. Fenton Atkinson drew attention, namely, regulation 34 (1) (*c*), which has to do with lifting appliances, and provides that, as far as the construction permits, the gear is to be inspected at least once every week by the driver, if competent for the purpose. If I had taken another view of the construction of this section, I think it must necessarily have led me to the view which Jenkins L.J. has expressed, namely, that the deceased man must necessarily have been in breach of this regulation which imposes an absolute duty on him to use suitable material, if those words are apt to cover this case; but I take the view that what he has to do under this part of regulation 4 is to co-operate in carrying out Parts II and VII.

Part II includes the scaffolding regulation 7 as to construction and material, which provides: "Every scaffold and every part "thereof shall be of good construction, of suitable and sound "material and of adequate strength for the purpose for which "it is used." The question whether or not he did co-operate in carrying out that particular regulation is very nearly allied to the question whether or not he was guilty of contributory negligence. The employers are under an absolute liability for breach of the regulations, but the deceased's own conduct has to be considered. Of course, if he had acted in flat defiance of regulation 7, in flat defiance of instructions which had been given by his employers, the plaintiff could not have recovered, as is shown by *Manwaring* v. *Billington*,[2] to which I have referred; but I agree with the judge when he stated in his judgment that in his view it had not been shown that in this case the deceased man had in any way consciously or deliberately disregarded the regulations or failed in his duty to co-operate in carrying out Part II, which includes regulation 7. I therefore need now only consider the question of contributory negligence.

[His Lordship referred to a summary by Ashworth J. of the criticisms of the deceased man's actions raised by the defendants and continued:] I think that this is one of those cases where it is very important to remember that the man against whom an allegation is made is not alive. As was pointed out by Lord Greene in *Hutchinson* v. *London and North Eastern Railway Co.*[3]: "where there is a defence of contributory negligence in "an action based on breach of a statutory rule which is designed "to protect men as much from their own carelessness as from "anything else, it is wrong to draw inferences unfavourable to a "deceased man and impute to him all those elements the absence "of which would negative any negligence on his part." Suppose that this man had been able to give evidence. One knows now that this coupler is, on the face of it, a perfectly good coupler, although it was unfamiliar to the chief witness for the defendants. The deceased might well have been able to say that it was a coupler which he recognized, having used one previously. There is no doubt that it was one used for scaffolding work by another firm employed on the site, and it looked to the judge almost a certainty that that coupler had got mixed up with the couplers which the defendants provided from the collection of one of the other firms; so that the deceased would have been in this position, that he had taken a coupler, which on the face of it was a perfectly good one, from the bay which he was dismantling. The bay contained this coupler, amongst others of the same kind, for there were others of these "stranger" couplers in that bay, and he might

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[2] [1952] 2 T.L.R. 689.

[3] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

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well have given evidence to the effect that he had looked at it and he had found that there was no stripping of the thread, nor was the bolt bent. If he had been believed upon that, I find it difficult to see how he could possibly have been found to have been negligent. The use of the "stranger" coupler, to my mind, is the high-water mark of the case against the deceased on contributory negligence, because he was a chargehand, he was an experienced scaffolder who had been some time in the employment of the defendant firm, and he must have known perfectly well that the ordinary stock of couplers which the defendants supplied consisted of "little giants" which are, in appearance, quite different from the coupler which turned out to be defective.

Recognizing a stranger in his hand, was he negligent in using it at all? I am bound to say that I agree with the judge's finding that he was not. I agree entirely with what my Lords have said—indeed, with what the trial judge said—that, having got the "stranger" coupler in his hand, he could hardly be held to be negligent in not detecting that the bolt was too long. Here was a man working 30 feet from the ground, not spending his time giving a minute examination to what he had in his hand, and the position in which he was working would be such as was demonstrated to us. He would not be able very easily to see that the bolt was too long once he had put the coupling round the vertical standard; and, if he could not see, it would be a good deal to ask of him to say that he should have been able to feel that it was this little bit too long.

[His Lordship also found that the deceased ought not to be held negligent for not following a routine drill and fixing the vertical standard before fixing the transom, and concluded:] For those reasons, I would have dismissed the appeal entirely.

*Appeal allowed.*
*Damages reduced by 20 per cent.*

Solicitors: *Botterell & Roche for Weightman, Pedder & Co., Liverpool; Bentleys, Stokes & Lowless for H. C. James, Crompton & Co., Bury.*

A. W. G.

## GREAT YARMOUTH CORPORATION *v.* GIBSON.

[1955 LO. 1125.]

C. A.

1955
*Dec.* 15, 16.

Evershed M.R.
Birkett and
Romer L.JJ.

*County Court—Jurisdiction—Sewer—Claim by local authority for cost of maintaining public sewer—Whether claim to be made in courts of summary jurisdiction—Whether general jurisdiction of courts ousted by special statutory provision for recovery of cost—Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 24 (1), (3), 293.

*Public Health—Sewage—Cost of maintaining sewer—Jurisdiction of county court—Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 24 (1), (3), 293.

A local authority brought proceedings in the county court against the owner of a house, claiming an apportioned part of the cost of maintaining a public sewer. The judge held that he had no jurisdiction to adjudicate on the claim because the general jurisdiction conferred by section 293 of the Public Health Act, 1936, had been ousted by a provision for the recovery of the costs contained in section 24:—

*Held* (Birkett L.J. dissenting), that the county court had jurisdiction to consider the claim, since the general jurisdiction conferred by section 293 would only be ousted by a provision in some other section as to the manner in which a claim could be recovered, and no such provision was made in section 24.

*Per* Birkett L.J. Section 24 (3) clearly contemplated that there should be proceedings in the court of summary jurisdiction by the local authority for the recovery of the expenses incurred under section 24 (1), and it was, therefore, impossible to say that section 293 (1) applied because provision was not made by any other section of the Act for the recovery of those expenses.

*Quaere* as to the right of an owner to raise as matters of defence to an action brought in a county court the matters specified in section 24 (3).

*Per* Evershed M.R. It seems that the owner could raise as matters of defence to an action such questions as were necessarily involved in the allegations underlying the claim, even though the time limit applying if such questions had been raised in a court of summary jurisdiction had expired.

*Per* Romer L.J. If the owner raised as a matter of defence to a claim in the county court any of the matters specified in section 24 (3), it might well be that the action would have to stand adjourned until the owner had had resort to a court of summary jurisdiction as contemplated by that subsection.

Appeal from Judge Carey Evans sitting at Great Yarmouth County Court.

Arthur E. Gibson was the owner of premises known as 8, Lichfield Road, Great Yarmouth. In March, 1955, the corporation of Great Yarmouth brought proceedings in the county court claiming that the sum of £13 16s. 5d. was due "in respect "of the apportioned cost of works of maintenance carried out "in pursuance of their statutory powers . . . in July, 1951, to "a length of sewer (being a length of sewer to which section 24 "of the Public Health Act, 1936,[1] applies) serving, inter alia, "the premises" in question. The owner by his defence challenged the allegation that the length of sewer was within section 24. He also alleged that the corporation had failed to consider representations made by him after service on him of the notice requiring payment, that the work done was unnecessary, the charges made unreasonable and the apportionment incorrect. The county court judge in an interim judgment found in the corporation's favour on each of these matters of fact; but in a reserved judgment he held that, having regard to the joint effect of sections 24 and 293 [1] of the Act of 1936, he had no jurisdiction to give the relief sought.

The corporation appealed.

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[1] Public Health Act, 1936, s. 24: "(1) Where a local authority have "carried out work for the maintenance of any length of a public "sewer, being a length to which this "section applies, they may, subject to "the provisions of this section, recover "the expenses reasonably incurred by "them in so doing from the owners "for the time being of the premises "served by that length of sewer in "such proportions as the authority "deem it fair to fix . . . Provided "that, . . . they shall, not less than "seven days before commencing the "work, give notice of the work which "they propose to undertake to the "owners of any premises known by "them to be served by the length of "sewer in question and consider any "representations as to the need for, "and reasonableness of, the proposed "work which may be made to them "by any of those owners within seven "days of the service of the notice. "The expression 'maintenance' in "relation to . . . a . . . sewer to "which this section applies includes "repair, renewal and improvement. ". . . (2) If a local authority, in lieu "of executing works of maintenance "only to any length of . . . a . . . "sewer . . . improve or enlarge that "length . . . for the purpose of enabling it to serve additional premises, "they shall be entitled to recover . . . "from the owners of the premises "served by the existing sewer such "sum only as they might reasonably "have expended in executing works of "maintenance. . . ."

"(3) Any question arising under "this section as to whether any "length of sewer is one to which this "section applies, as to the necessity "for any work carried out by a local "authority, as to the amount, or the "reasonableness, of the expenses incurred by them, or as to the fairness "of any division or apportionment of "expenses made by them, may be "determined by a court of summary "jurisdiction either in proceedings "taken by the local authority for the "recovery of expenses incurred by "them, or on the application of any "owner concerned."

Section 293: "(1) Any sum which a "council are entitled to recover under "this Act, and with respect to the "recovery of which provision is not "made by any other section of this "Act, may be recovered either summarily as a civil debt, or as a "simple contract debt in any court of "competent jurisdiction."

*Peter Boydell* for the corporation. By section 293 of the Public Health Act, 1936, the county court, the High Court or the court of summary jurisdiction have jurisdiction to consider this type of claim unless there is some other provision made in the Act as to the manner in which the money can be recovered. The owner has relied on section 24, but that section is silent as to the method of recovery and as to the court in which a local authority can recover. If the claim is made in the county court the corporation will have to establish their claim, and it is conceded that the owner will then be able to raise by way of defence all the matters which he could have raised in the court of summary jurisdiction even though the making of claims in that court is subject to a time limit which might have passed. But even if the owner was unable to raise in a county court matters which would have been open to him to raise in a court of summary jurisdiction, that would not be conclusive of the construction of section 293.

The chief purpose of section 24 (3) is to enable an owner to have recourse to a court of summary jurisdiction so that matters can be settled quickly, either by way of defence to a claim by the local authority or by enabling an owner to obtain a declaration as to whether the work was necessary and so forth before the claim is made or proceedings taken. The section contemplates that a local authority may seek to recover expenses in a court of summary jurisdiction; it assumes that that method is available, but it does not make it available by giving the local authority power to go there, nor does it enjoin the authority to do so. The local authority have been in the habit of bringing claims of this nature in the county court ever since 1936. Neither Lumley's Public Health, 12th ed., vol. 3, pp. 2281, 2783, nor Stone's Justices' Manual, vol. 2, p. 1818, suggest that section 24 provides the exclusive method for the recovery of expenses.

By section 293 (1) the sum to be recovered is to be equated to a simple contract debt, and by the terms of section 24 (1) the local authority will have to establish to the satisfaction of the court the matters referred to in that section. It is arguable that but for section 24 the owner might be precluded from raising the matters there referred to in a defence to a claim as a civil debt: *Reg.* v. *Paget.*[2] See also *Hayles* v. *Sandown Urban District Council,*[3] in which a similar phrase occurring in section 14 of the Private Street Works Act, 1892, was considered.

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[2] (1881) 8 Q.B.D. 151.

[3] [1903] 1 K.B. 169.

Section 24 (3) contemplates that an issue between an owner and a local authority may be determined by a court of summary jurisdiction, but under subsection (5) a local authority is empowered to recover expenses in a county court. It is not open to the owner to say that proceedings in the county court must be adjourned because the section provides that certain matters may be determined by a court of summary jurisdiction and they have not yet been determined there.

[Reference was also made to sections 35 (1), 36, 60 (1), (3), 78, 96 and 290.] It is significant that even if an owner is unable to raise in defence to an action in the county court all the matters referred to in section 24 (3), he would be in no worse position than an owner would be under section 290 (7) if he had omitted to avail himself of the right of going to the justices under section 290 (3).

*F. S. Laskey* for the owner. If the corporation is entitled to take proceedings in the county court, the time within which the matters referred to in section 24 have to be raised in the courts of summary jurisdiction has long past.

Section 24 (3) provides the remedy which is available to either party under this section where work has been done. The local authority can take proceedings to recover their expenses or the owner can make application in respect of the matters mentioned in subsection (1). The section covers not only what happens after the work has been done but also what may happen before the work has been done. By subsection (3) all the matters there specified can be raised, but only in the justices' courts. Subsection (3) applies where the owner had put forward objections under the proviso to subsection (1) and had then been informed by the local authority that it was proposed to carry on with the work despite his objections. It applies not only to the recovery of expenses incurred, but also to disputes as to the reasonableness of the work to be done. Section 293 applies in any case where the Act does not lay down what court is appropriate or what should be the method adopted for the recovery of expenses. So far as claims for the cost of maintenance of public sewers are concerned, that general provision is ousted by section 24 (3), which by necessary implication provides for the recovery of the expenses incurred. To hold otherwise would result in circuity of procedure. Little help can be got from the scheme of the Act as a whole, for this is a fragmentary Act and the sections generally have no connexion with each other.

The claim put forward by the corporation is not for a simple contract debt—the words in section 293 are not "as if it were a "simple contract debt." There is no question here of any agreement giving rise to such a debt, for from the outset the owner has said that the work was not needed.

A complaint under section 24 (3) is subject to the time limit imposed by the Summary Jurisdiction Act, 1848, and time runs from the date of the service of the demand for payment. The corporation have conceded that the owner can raise matters referred to in section 24 (3) as defences to an action in the county court, but the question remains whether the Act enables them to make that concession.

A number of sections contain provisions which oust section 293. [Reference was made to sections 34 (5), 36 (3), 38 (2).]

EVERSHED M.R. stated the facts, referred to the relevant sections of the Act of 1936 and continued: The question and the whole question with which we are concerned depends on the phrase in section 293 (1) "with respect to the recovery of which "provision is not made by any other section of this Act." It is conceded that if there is no such provision as is there mentioned, then (subject to one point which I will consider in a moment) section 293 applies to confer upon the county courts jurisdiction (in a case, of course, within the limits of the county courts' jurisdiction) to adjudicate upon a claim of this kind by a local authority.

The one small point I mentioned was taken by Mr. Laskey and arises out of the words "as a simple contract debt." He said that whatever else might be said about the claim here made for doing work upon a sewer, it bore none of the characteristics of a simple contract debt. With that I agree; but in my view it is made quite plain from a general conspectus of the Act that the words "as a simple contract debt" do not mean, where the debt is properly one of contract, but do mean, as though it were a simple contract debt; the object being to determine the nature of the claim, and, particularly in a county court case, thereby to define the limits of the jurisdiction.

The judge came to the conclusion, adverse to the corporation, that in this case there was provision made by another section of the Act with respect to the recovery of this sum, namely, the provision to be found in section 24 (3), and that thereby the county court jurisdiction was excluded.

It has to be confessed that there is something of an inelegance in the statute, to which Mr. Laskey attributed the epithet "fragmentary," having regard to the large variety of subject-matters with which it deals. But, none the less, as I construe these sections, and with all respect to the view taken by the judge, and with an added diffidence because my brother Birkett takes a different view, I have come to a conclusion different from that entertained by Judge Carey Evans; for I think it not true to say that section 24 contains such a provision as is mentioned in section 293 and as, therefore, inapt to exclude the generality of that section.

The point, as I have said, is a short one and not capable of great elaboration; but first I would observe, as Mr. Laskey conceded, that one does not find anywhere in section 24 an express provision conferring jurisdiction upon, or specifying, the justices' court as being the appropriate tribunal where the local authority can recover their expenses. At most, it has to be said that the language of subsection (3) proceeds upon the hypothesis and assumes and recognizes that in the justices' courts these sums may be recovered. Let me read again the words: "Any "question . . . may be determined by a court of summary "jurisdiction either in proceedings"—that means in the course of proceedings—"taken by the local authority for the recovery "of expenses incurred by them, or on the application of any "owner concerned." Such a question may be determined by a court of summary jurisdiction.

That subsection would have had, as it seems to me, exactly the same effect if it had been: " . . . may be determined by a "court of summary jurisdiction either in proceedings taken under "section 293 of this Act by the local authority or on the application of any owner concerned." I think subsection (3) is a provision defining the right of the owner to raise certain questions in a particular manner, but I cannot construe that provision fairly as "a provision with respect to the recovery" of these expenses made by section 24.

In the course of the argument attention was drawn to the language in subsection (1): "Where a local authority have "carried out work . . . they may, subject to the provisions of "this section, recover . . ." Had that language run "they "may in accordance with the provisions of this section recover," it might, I think, then have produced the result that by subsection (1) Parliament was limiting the right to recover to such right as was found, either expressly or implicitly, in the section and nowhere else; but "subject to the provisions of this section" to my mind means no more and no less than "subject to such "limitations of their right to recover as one finds in this section"; and those limitations undoubtedly include, of course, the privileges of challenge conferred upon the owner by subsection (3). With the assistance of counsel, we went through the Act to see what other instances there were in which the problem posed by the formula "and with respect to the recovery of which provision "is not made by any other section of this Act" might arise. It is plain that there is no other section which in its language provides an exact parallel. It is perhaps on that ground that Mr. Laskey justified the appellation "fragmentary" to the Act; but I will refer to one of the sections in order to illustrate a point that I think emerges from the whole.

Section 38 is in the same part of the Act [Part II], and, according to a sidenote, it deals with the case of "drainage of "buildings in combination." Subsection (2) provides that the local authority who make such a requirement as is provided in the preceding subsection shall fix the proportions in which the expenses of constructing and maintaining the sewer are to be borne by the owners concerned; and in a separate paragraph the same subsection then provides: "An owner aggrieved by the "decision of a local authority under this subsection may appeal "to a court of summary jurisdiction; but, subject to any such "appeal, any expenses reasonably incurred in constructing, or "in maintaining or repairing, the private sewer shall be borne in "the proportions so fixed, and those expenses, or, as the case "may be, contributions thereto, may be recovered accordingly "by the persons, whether the local authority or owners, by whom "they were incurred in the first instance."

It is not, I think, in doubt that there is in section 38 no provision with respect to the recovery of the sums mentioned which excludes the general jurisdiction of the courts under section 293; so that section 293 in that case applies. But it will be observed that the general jurisdiction is linked with a particular right of the owner to appeal to a court of summary jurisdiction. It is true that the parallel is not perfect, because the right of the owner under section 24 is not limited to an appeal of his own motion to a court of summary jurisdiction; he is told by subsection (3) that he can also raise these matters of challenge in the course of proceedings taken against him in that court. In section 38 that is impossible; if he omits to appeal, he loses his opportunity of challenge. Here it is otherwise. The point,

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however, is—and it is reflected in other sections, for example, in section 290—that there seems to be throughout the Act the linked conceptions that there may be a special right in the owner to appeal to, and have these matters determined by, courts of summary jurisdiction, and, at the same time, general jurisdiction in the courts, the courts of summary jurisdiction, the county court and the High Court, to entertain claims made to recover the various sums with which the Act is concerned.

One other point should be mentioned: the judge was much moved towards the conclusion at which he arrived by this kind of consideration: he observed, as I have already noticed, the special right conferred upon the owner to have matters raised as to the length of sewer and so forth before the courts of summary jurisdiction. As follows from the Acts of Parliament regulating the courts of summary jurisdiction, the effect is to impose a strict time limit upon the jurisdiction to deal with these questions. Similarly, if the local authority allow a certain length of time—six months—to elapse, they will be liable to be met with a complete answer by an owner sued in a court of summary jurisdiction that they had allowed the matter to get out of time. In the present case it will be recalled that this work was done as long ago as 1951; and the question then arises, is it right that a county court should have jurisdiction when the authority to determine a claim would be barred in the courts of summary jurisdiction? More difficult still: what is the situation of the owner—can he raise in the county court at any time as matters of defence these questions which section 24 (3) puts into the jurisdiction of the courts of summary jurisdiction? If the answer is that he cannot raise them at all in the county court, it might be that a county court case would have to be adjourned while these matters were disposed of by the courts of summary jurisdiction, if still within the time limit imposed for those courts.

It was partly on those grounds and by reason of the anomalies that the apparent conflict might cause that the judge felt that the right view here to be that Parliament intended the whole matter to be disposed of exclusively by the courts of summary jurisdiction. It is not in the circumstances strictly necessary for me to express any view upon this aspect of the matter. I have said that the owner raised as substantive matters of defence various points which are comprehended by section 24 (3), and the county court judge found as a fact against him on all of them. What is more, the corporation have conceded throughout that it is open to a defendant, or was, at any rate, in this case open to the present defendant [the owner], to raise by way of challenge these various defences. Nevertheless, since the question has been argued and it may well be that the matter is of some importance, I will express my view as at present advised that, in so far as any of these questions are really involved as matters of necessary allegation in any case in the courts, then they would be open to challenge.

Let me illustrate what I am saying by a second reference to the particulars of claim in this case. The corporation claim the sum of £X in respect of the apportioned costs of works of maintenance carried out in pursuance of their statutory powers to a length of sewer. Let it be assumed that the owner merely denied all the allegations in the particulars of claim. It would presumably then be necessary for the plaintiff corporation to prove the facts which they alleged and which they must allege to recover the sum of money claimed. That is not, however, to say that all the matters which are raised or intimated in section 24 (3) are necessarily open as matters of defence. For example, the question whether the work was necessary may stand upon a somewhat different footing from the question whether the expenses were reasonable. Upon that matter I express no view, as it is not necessary in this case. No doubt a council who for one reason or another sues in the county court may think it proper not to stand in the way of any question that an owner wants to raise being solved: but as a matter of strict jurisdiction I confine myself to saying that, as far as I at present see the matter, an owner sued in the county court or the High Court would be entitled to raise as matters of defence such questions as were necessarily involved in the allegation which lays the foundation for the claim being made. I think the possible anomalies which the judge mentioned, if his view is right that these points cannot be taken where there is special provision made for the courts of summary jurisdiction to determine them, would indeed arise in other instances in the Act, and I do not find it necessary to pursue the matter further.

For the reasons which I have stated, I have myself come to a different conclusion from the judge. I think he had jurisdiction to determine this case, and that, having regard to his conclusion on the matters of defence, he should have given judgment for the corporation for the sum of £13 16s. 5d.

BIRKETT L.J. I am naturally very sorry to differ from the judgment of the Master of the Rolls which has just been

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delivered, and it is scarcely necessary to say that I differ with all due deference; but, having formed a fairly clear opinion about the matter, I think it right to give expression to it. The point is very short and I can deal with it with brevity. I think the county court judge was right, that he came to a proper conclusion, that his judgment ought to be supported and that this appeal ought to be dismissed. [His Lordship referred to the facts and to the judgment of the county court judge. He continued: ]

The short point in the matter is this, as I see it: under section 293 (1) of the Public Health Act, 1936· "Any sum which "a council are entitled to recover under this Act. . . ." and there was no question whatever that the judge said they were entitled to recover under this Act of Parliament, "and with respect to "the recovery of which provision is not made by any other "section of this Act, may be recovered either summarily as a "civil debt, or as a simple contract debt in any court of competent jurisdiction." The important words, therefore, are "provision is not made by any other section of this Act"; and we have had cited to us, of course, sections where no provision was made, where the terms of section 293 (1) would automatically come into operation. But Mr. Laskey says that section 293 has in reality no application to the facts of the present case, and the judge was quite right in deciding as he did. It becomes necessary, therefore, to look with some care at section 24 of the Act; because it is said and the county court judge has found in his view that that section does make provision for the recovery of a sum to which the corporation are entitled.

Section 24 (1) provides: "Where a local authority have carried "out work for the maintenance of any length of public sewer, being "a length to which this section applies"—as the judge found it did—"they may, subject to the provisions of this section, "recover the expenses reasonably incurred by them in so doing "from the owners for the time being of the premises served "by the length of sewer in such proportions as the authority "deem it fair to fix, regard being had by them to all the circumstances of the case, including the benefit derived by each "owner from that length of sewer, the distance for which it is laid "in land belonging to each owner, the point at which any work "was necessary and the responsibility for any act or default "which rendered the work necessary." That is laying down general terms for the recovery of the expenses; but it is said that that does not go far enough, that the section must do more than provide for the recovery of the expenses: it must state how, where, when, to prevent section 293 (1) coming into operation.

I think that the words "they may, subject to the provisions "of this section" are important. The local authority cannot recover without having regard to the provisions of the section. There follows a proviso that if the work is not urgent, they must give notice before beginning the work, so that objections can be heard and made. Then there is subsection (3), which I think is the important matter: "Any question arising under this "section as to whether any length of sewer is one to which this "section applies, as to the necessity for any work carried out "by a local authority, as to the amount, or the reasonableness, "of the expenses incurred by them, or as to the fairness of any "division . . . may be determined by a court of summary "jurisdiction."

The first thing is, therefore, that the provisions of the section, to which by section 24 (1) recovery of expenses is made conditional, include subsection (3), which states that one cannot recover unless the matters which are set out there for the protection of the owner have been determined by a court of summary jurisdiction.

The next question which I think arises is this: how is that to be done? It may be done in two ways, which are both set out in the subsection. The first is that they "may be determined by a court of summary jurisdiction either in proceedings "taken by the local authority for the recovery of expenses "incurred by them. . . ." I am bound to say that I find it quite impossible, in view of that language, to say that there is no provision laid down by the Act. It is stating quite plainly, I think, that in a court of summary jurisdiction the local authority may recover their expenses, and in those proceedings the owner, the defendant, may raise all these questions. The other way in which these matters may be determined is, of course, "on "the application of any owner concerned." He can take the initiative and go to the court of summary jurisdiction and raise these matters. I think the important thing is the words in subsection (3): "may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for "the recovery of expenses incurred by them. . . ." It clearly contemplates that there should be proceedings in the justices' court by the local authority for the recovery of the expenses incurred under section 24 (1); and I think, therefore, that it is really quite impossible to say that section 293 (1) applies because provision is not made by any other section of this Act for the recovery of these expenses.

That is the shortness of the point. Section 293 (1) only comes into operation if there is no provision made—not an exclusive provision. It is not necessary to show that one can only do it this way or one can only do it that way. The question is whether there is any provision. When one gets these plain words, that these expenses "may be determined by a court of "summary jurisdiction either in proceedings taken by the local "authority for the recovery of expenses incurred by them," that is these expenses, I find it impossible to say that there is no provision made for the recovery of the expenses by the local authority. It is on that main ground that I would support the county court judge.

As a matter of fact, the other questions of great interest which were raised by the county court judge are what I should call the supporting arguments. They are not absolutely vital to the decision. The county court judge said that these questions could not be raised in the county court because section 24 provides that the place to raise them is the court of summary jurisdiction. It so happens that in this case, as Evershed M.R. has pointed out, there has been terrible delay; and so if as a matter of fact these proceedings were to be confined to the jurisdiction of the court of summary jurisdiction, the time would have expired. But that difficulty was met in this case by the corporation conceding that all these matters might be raised in the county court. The county court judge considered them, and he decided them all in favour of the corporation. He said: "The fact that it is plainly provided in express terms that all "these questions may be determined in a court of summary "jurisdiction (in proceedings initiated by one party or the other) "to my mind clearly prevents a county court judge from deciding "these questions—though I have in fact given my views upon "them in case upon appeal it shall be held that my decision on "the point of law is erroneous. It is fair to the corporation "to point out that they were willing to concede that I could "decide all such questions; as they were anxious not to shut out "the defendant from raising these questions merely because the "plaintiffs have chosen to sue in the county court. Nevertheless, "I have no power to do so in my judgment; and no concession "by the corporation in a particular case can alter the construction of subsection (3)."

He considered certain anomalies which might arise and concluded: "The conclusion I have reached is that the corporation's "contention is unsound; that section 24 (3) is intended, though "perhaps somewhat ambiguously worded, to provide for the "recovery of the expenses in a court of summary jurisdiction, "where alone practically all questions as to liability may be "determined, and that the subsection makes provision with "respect to the recovery of these expenses in a court of summary "jurisdiction with the result that there is no room for any "remedy in the county court. The claim must, therefore, be "dismissed with costs."

It is, of course, common knowledge that under Acts of Parliament like this great Act of Parliament, the Public Health Act, matters of disputation which inevitably arise between local authorities and individual owners must in some way be determined, and it has always been the desire that there should be a cheap and expeditious method by which those matters could be determined, and, therefore, the courts of summary jurisdiction were used for that purpose; and I think here that when section 24 (3) is considered, it is not possible to say that the Act of Parliament has not shown any way or made any provision for the recovery of these sums incurred by a local authority. In my view, the decision of the judge is right and it ought to be affirmed.

ROMER L.J. This case is obviously one of some difficulty, but for myself I have arrived at the same conclusion as the Master of the Rolls in thinking that the county court judge did have jurisdiction to entertain the proceedings. There is no doubt but that the corporation are suing for a sum which they are entitled to recover under the Act of 1936 within the meaning of that phrase as used in section 293, because it is a sum which they are entitled to recover under section 24 (1). Under section 293 they can proceed either summarily or in a court of competent jurisdiction for recovery of this sum, unless provision is made with respect to its recovery in any other section. I take this to mean unless provision is made for the manner of its recovery in any other section. It is suggested that section 24 not only entitles the corporation to recover this sum, the sum for which they are suing, under subsection (1), but that subsection (3), either standing by itself or in conjunction with subsection (1), provides also for the manner of its recovery, viz., before a court of summary jurisdiction. Subsection (1), in my opinion, is quite silent on the point. It would have been otherwise if it had said "in "accordance with" instead of "subject to the provisions of "this section", or if it had said "may recover by the proceedings in this section mentioned," or the like; but it seems to me that the phrase "subject to the provisions" merely places a qualification on the right to recover which is conferred by subsection (1). Then as to subsection (3); I cannot read this as providing for the manner in which the sums can be recovered. It appears to me to be no more than a recognition or an assumption of the right to proceed in a summary way. That is one of the two ways which are authorized or contemplated by section 293; and I do not regard the incidental recognition—for that I think is all it is—of one way as providing that that is the way of proceeding to the exclusion of the other. I think that subsection (3) is not providing for a way at all, but is merely prescribing two methods by which an owner who thinks himself aggrieved can obtain redress, viz., either by himself applying to the justices under the subsection, or by raising his complaint by way of defence if a local authority proceed against him before the justices under section 293.

There is the other point which, as Evershed M.R. has said, is not necessary for our decision. I think it is a difficult one. On the hypothesis, which I believe to be the true one, that proceedings can be taken before the county court, the question is as to what defences the owner can raise and which could be adjudicated upon by the county court judge or other competent court before which the matter is brought. It does not seem to me that the question is likely to arise very often, because I suppose that, generally speaking, proceedings would be before the justices, and an owner most probably, nine times out of 10, if he were aggrieved, would take the necessary steps himself, as he is entitled to do under section 24 (3). But if the matter were brought, as it has been brought in the present case, before the county court by the local authority, I think it is probably true to say, as Evershed M.R. has indicated, that the owner could put the local authority to proof of their case, and they would have to establish, therefore, to the satisfaction of the county court judge or other judge that the necessary conditions precedent to their right to recover under subsection (1) existed. I think myself that section 24 (3) does largely provide a code in which certain matters are mentioned specifically, which in the minds of the legislature were matters which were to be determined by the courts of summary jurisdiction. I quite appreciate the inconvenience of this view, but if some of those matters arose or the owner desired to raise them when he found himself defending an action in the competent court, it might well be that the action would have to stand adjourned until the owner had had resort to the court of summary jurisdiction in the manner contemplated by subsection (3). It is, however, unnecessary to express any concluded view upon the scope of the jurisdiction of the county court once the matter has been brought before it, and I prefer to express no concluded view upon the question. I content myself with merely saying that I am satisfied that the county court has jurisdiction to entertain such proceedings as these, and I would, accordingly, allow the appeal.

*Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co. for Farra Conway, Town Clerk of Great Yarmouth; Smith & Hudson for Wiltshire, Sons & Tunbridge, Great Yarmouth.*

E. D.

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## LONGSDON *v.* MINISTER OF PENSIONS AND NATIONAL INSURANCE.

1955
*Dec.* 12.

Havers J.

*National Insurance—Contribution—Exception—"Income"—Whether net or gross income to be considered for purposes of exception from contribution—National Insurance Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 5 (1) (*a*) (iii).

The applicant was the owner of a farm and a herd of pedigree cattle. In order to improve the farm and build up his herd, he had ploughed back all profits made and as a result had shown consistent net losses amounting in the years 1951–1952 and 1952–1953 to £2,779 and £1,850 respectively. During the same years his gross income from securities and shares owned by him amounted to £293 and £297. He maintained a standard of living representing expenditure at the rate of £1,500 a year partly by selling capital and borrowing from the bank. For income tax purposes his income was assessed at nil. On appeal from a decision of the Minister that for the period January, 1952, to December, 1953, the applicant was not entitled to a certificate of exception from liability to pay contributions under section 5 (1) of the National Insurance Act, 1946, on the ground that his income exceeded £104 a year:—

*Held*, that, for the purposes of section 5 (1) (*a*) (iii) of the Act of 1946 "income" meant that which comes in, and although the applicant might have no income which was assessable to tax, the

Act was not concerned with net income and, in the circumstances, he was not entitled to exception from liability to pay contributions.

Dictum of Bronson J. in *People* v. *Niagara Board of Supervisors* (1842) 4 Hill (N.Y.) 20, 23 applied.

*Commissioners of Taxation* v. *Teece* [1899] A.C. 254 distinguished.

APPEAL by case stated from a determination of the Minister under the National Insurance Act, 1946.

On December 3, 1953, the applicant, Anthony Ernest Cross Longsdon, in accordance with the provisions of regulation 3 (1) of the National Insurance (Determination of Claims and Questions) Regulations, 1948, sent to the Minister an application for the determination by the Minister of the question whether the applicant was entitled to the issue of a certificate of exception from liability to pay contributions under the National Insurance Act, 1946,[1] for the period from January 2, 1952, to December 3, 1953.

The Minister, in accordance with regulation 3 (3) of the regulations, appointed Mr. W. H. Cobham Hodges, Barrister-at-Law, to hold an inquiry into the question and to report to him thereon. On January 10, 1954, an inquiry was held at the applicant's residence when the applicant gave evidence. After considering the report made by Mr. Cobham Hodges, the Minister found the following facts. At all material times the applicant had been self-employed as a farmer, farming at Smithwood Farm, Cranleigh, Surrey, until September, 1952, and thereafter at The Manor, Little Longstone, near Bakewell, Derbyshire. His principal occupation was the building up of a herd of pedigree Guernsey cattle. The applicant bought Smithwood Farm at the end of the last war for about £8,000 and sold it, after the expenditure of considerable sums on improvements, in September, 1952, for £18,978: this figure did not include development value under the Town and Country Planning Act, 1947. The Manor, Little Longstone, had been in the family for many generations and was entailed. The applicant had 130 acres in hand. In order to improve his farms and build up his herd, the applicant had ploughed back all profits made and had fed capital into the farms. As a result he had shown consistent net losses, his losses for the years for which accounts were available being: 1951/1952—£2,779 17s. 10d.; 1952/1953—£1,850 14s. 3d; and it was understood that his loss for the year 1953/1954 was approximately the same as for that of 1952/1953. These figures had been accepted for income tax purposes by the Inland Revenue. In addition to his farm, the applicant was the owner of a mineral water factory at Malvern, Worcestershire. The business was taken over from an elderly relation in May, 1952, when it had been losing money for some years, for an annuity of £300. The vendor died about 18 months after the purchase. There were debts of some £900 owed by the firm. The losses from June to December, 1952, were £325 5s. 8d. Debts had largely been paid off since, but the firm was not yet making a profit.

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[1] National Insurance Act, 1946, s. 5 (1): "Subject to the provisions "of subsection (2) of this section, "regulations may provide for— "(*a*) excepting insured persons from "liability to pay contributions for "periods— . . . (iii) when they were "not in receipt (or are deemed in "accordance with the regulations not "to be in receipt) of an income "exceeding £104 a year. . . ."

The applicant also owned certain property: in the year 1951/1952 its net annual value was £746 10s., maintenance cost approximately £363, and improvements and alterations approximately £102. In 1952/1953 the figures were: net annual value £661; maintenance £659; and improvements and alterations £8,721.

The applicant possessed certain securities and shares of public companies with Stock Exchange quotations. The net value and gross income therefrom in the year 1951/1952 and 1952/1953 were £8,526 and £293; £8,226 and £297, respectively. In 1953/1954 his investment income was at least £200. The applicant maintained a standard of living representing expenditure at the rate of approximately £1,500 per annum, partly by selling capital and borrowing from the bank.

On July 27, 1954, the Minister notified the applicant of his decision that in respect of the period January 2, 1952, to December 3, 1953, the applicant was not entitled to the issue of a certificate of exception from liability to pay contribution as a non-employed person under section 5 (1) of the National Insurance Act, 1946.

On September 14, 1954, the applicant applied to the Minister to be furnished with the grounds on which his decision was based, and by a letter dated October 15, 1954, the applicant was informed that the Minister was of the opinion that the applicant's business losses were not to be set against his income from stocks and shares in determining whether he was in receipt of an income exceeding £104 a year (now £156 a year[2]) for the purpose of section 5 (1) (*a*) (iii) of the Act of 1946, and regulation 13 of the National Insurance (Contributions) Regulations,

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[2] See National Insurance Act, 1955, s. 1 (1).

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1948, and, accordingly, that he was in receipt of an income exceeding £104 for such purposes.

The applicant appealed.

The applicant in person. In considering whether the income in question exceeded £104 a year within section 5 (1) (*a*) (iii) of the Act of 1946, the Minister should not have applied severance between the trading losses and income from investments. If, for the purpose of income tax, a person's income is assessed at nil, then that person is not in receipt of an "income" within section 5 (1) (*a*) (iii).

*Rodger Winn* for the Minister. Having regard to the applicant's investment income, he is not entitled to exception from liability to pay contributions. "Income" within section 15 (1) of the Act of 1946 is not income as assessed for income tax and does not mean "net income" but, to use the words of Bronson J. in *People* v. *Niagara Board of Supervisors*,[3] "that "which comes in or is received from any business or investment "of capital without reference to the outgoing expenditure." Lord Selborne L.C., in *Jones* v. *Ogle*,[4] also defined "income" as it appeared in the Apportionment Act, 1870, as "what comes "in." In *In re Huggins, Ex parte Huggins*,[5] Sir George Jessel M.R. said: "The word 'income' is as large a word as can be "used," and it is submitted that in the present case the word should not be given a restricted meaning.

It is true that in *Commissioners of Taxation* v. *Teece*,[6] a case in the Privy Council concerned with the construction of section 28 (1) of the New South Wales Land Income Tax Assessment Act, 1895, it was held that "income" meant the income of the taxpayer as a whole from which the taxpayer was entitled to deduct expenses, but in that case provision was made in the statute for deductions. In the present case regulation 14 of the National Insurance (Contributions) Regulations, 1948, sets out those items which are not to be considered as income in assessing whether an applicant is in receipt of an income exceeding £104 a year, and the proper inference is that, so far as the Act of 1946 is concerned, apart from the items mentioned in regulation 14, income means all that is coming in to a person from a source of income irrespective of expenditure incurred in relation to either the same or another source of income or potential income.

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[3] (1842) 4 Hill (N.Y.) 20, 23.

[4] (1872) 42 L.J.Ch. 334.

[5] (1882) 51 L.J.Ch. 935, 938.

[6] [1899] A.C. 254.

[HAVERS J. The Act is not concerned with the source of any income, but only with what is actually received.]

Yes. A person must show that he is not in receipt of an income exceeding the specified amount (now £156, but at the material time £104). The applicant admits that he had an income of more than £104 from share investments, but says that having regard to his total business farming activities he had no taxable income. He was in receipt of an actual income exceeding £104 a year, even if, when looking at the expenditure on his farms and houses, one can say that the net income from all sources, merged into one channel, did not exceed that sum. The word in the statute is "income" and not "net income." The only question is whether he had coming into his hands an income above £104: such an income may consist of the actual income from one source or the aggregate of actual income from more than one source, but the income from any one source cannot be reduced for the present purpose by expenditure relating to a different source of income or potential income, at any rate in the absence of clear evidence that the applicant regularly applied income from any one source solely to provide trading capital for the pursuit of profits in another activity designed to produce income. On the facts, the applicant clearly did have *an* income of more than £104 and, therefore, he is not entitled to exception.

HAVERS J. This is an appeal by Anthony Ernest Cross Longsdon against a decision of the Minister of Pensions and National Insurance whereby he decided that the applicant did not come within the provisions of section 5 (1) (*a*) (iii) of the National Insurance Act, 1946, and, therefore, was not excepted from liability to pay contributions.

The National Insurance Act, 1946, provides that every person after the appointed day who is over school leaving age and under pensionable age in Great Britain and who fulfils the prescribed regulations is compulsorily insured under the Act and continues to be insured. The classes of insured persons are: (*a*) employed persons; (*b*) self-employed persons; and (*c*) non-employed persons. The Act provides that in order to establish a source of funds the insured person, together with his employer, should make contributions. Section 5 of the Act provides certain exceptions from liability for making contributions. [His Lordship read section 5 (1) (*a*) and continued:] The applicant contends that upon the true construction of section 5 (1) (*a*) (iii) he is entitled to be exempt from liability to pay contributions because, as he says, he is not in receipt of an income exceeding £104 a year.

In accordance with the power conferred by the Act, the National Insurance (Contributions) Regulations, 1948 (S.I. 1948, No. 1417), were made under this section. Regulation 13 contains certain special provisions relating to the granting of certificates of exception. Regulation 14 is of importance for the purpose of this appeal because, in effect, it provides that certain sums which may be received by the applicant are not to be taken into account for the purpose of calculating his income within the meaning of the section. Regulation 14 provides: "Where an applicant for "a certificate of exception is in receipt of an income exceeding "one hundred and four pounds a year by reason only of the "inclusion therein of any one or more of the following items, he "shall be deemed for the purposes of section 5 (1) (*a*) (iii) of "the Act not to be in receipt of an income exceeding one hundred "and four pounds a year." Then there are specified a number of sums from certain sources to which this regulation applies. For instance, there is a sum received by way of assistance under the National Assistance Act, 1948, a sum received by way of old-age pension as a blind person under the Old Age Pension Act, 1936, and some other sums which may be described as ejusdem generis to the two which I have already mentioned.

[His Lordship referred to the Minister's findings of fact and continued:] In the light of those findings the Minister came to the conclusion that, on the true construction of section 5 (1) (*a*) (iii) of the Act of 1946, the applicant was not entitled to exemption from liability to pay contributions. Against that decision the applicant has appealed, and the grounds upon which he asks me in his notice of appeal to say that the decision is wrong in law are that the Minister: 1. In making his decision took into account the fact that the applicant had from investments an income in excess of £104 a year without also taking into account the losses from the applicant's business transactions which reduced his net income to a figure lower than the sum of £104. 2. In assessing the applicant's income in this way elected to exercise severance in respect of such income, thereby exercising a discretion not granted to him by the provisions of the Act. 3. In making his decision took into account the standard of living maintained by the applicant which he held to be at a figure in excess of £104 a year and which was admitted by the applicant although the Minister, in the case, admitted that such standard of living had been maintained by the applicant by the selling of capital and borrowing from the bank.

The applicant has appeared in person to argue his case before me, and he has put his case very clearly and forcefully. He contends that in considering what is meant by "income" the Minister ought to take into consideration the whole of the sources of income and the net results of the trading as regards his farm and the properties which he owns and the business which he says he took over from a relation. He contends that if it appears, as the result of the assessment for income tax, that he is under no liability to pay tax, then he is not in receipt of income within the meaning of section 5 (1) (*a*) (iii). His argument really comes to this: that the word "income" in section 5 (1) (*a*) (iii) of the Act should be read as either "net income" or "income "assessable to tax."

Mr. Rodger Winn has called my attention to a number of authorities in which the courts overseas have from time to time considered the true interpretation of the word "income." One decision was that of *People* v. *Niagara Board of Supervisors.*[1] It is an American decision and the passage to which Mr. Rodger Winn directed my attention is in the judgment of Bronson J. In the course of his judgment he said[2]: "A tax is to be levied "upon all monied or stock corporations 'deriving an *income* or "'profit from their capital, or otherwise.' And the name of the "corporation is only to be stricken from the assessment roll when "the president or other proper officer shall make affidavit, 'that "'such company is not in the receipt of any profits or *income*.' "It is undoubtedly true that 'profits' and 'income' are some- "times used as synonymous terms; but, strictly speaking, "'income' means that which comes in, or is received from any "business or investment of capital, without reference to the "outgoing expenditures: while 'profits' generally mean the gain "which is made upon any business or investment when both "receipts and payments are taken into the account. 'Income,' "when applied to the affairs of individuals, expresses the same "idea that *revenue* does when applied to the affairs of a state "or nation; and no one would think of denying that our Govern- "ment has any revenue because the expenditures for a given "period may exceed the amount of receipts."

Of course, I have to bear in mind, in referring to these cases, that they are cases upon the word "income" in a wholly different statute in a different country and made for entirely different purposes from those for which the National Insurance Act, 1946, was made in this country. However, this judgment does give some assistance and throws some light on what is the general meaning of the word "income."

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[1] (1842) 4 Hill (N.Y.) 20.

[2] Ibid. 23.

In *Jones* v. *Ogle*[3] the headnote reads: "Profits in a private "trading partnership, carried on under a deed by which it was "provided that such dividends should be made from time to time "amongst the partners as the managing partners should direct, "are not dividends or other periodical payments in the nature of "income within the meaning of the Apportionment Act, 1870 (33 "& 34 Vict. c. 35), and are not apportionable as between tenants "for life and residuary legatees under that Act." Lord Selborne L.C. in the passage of his judgment relevant to this case said[4]: "Then as to the word income, it is a general expres-"sion signifying what comes in, and that expression is used, as "it happens in the Act of Parliament itself, with reference to a "periodical payment in the nature of income."

Mr. Rodger Winn referred, in support of his argument, to a passage in *In re Huggins, Ex parte Huggins*,[5] in which Sir George Jessel M.R. said: "The present appellant's income is not "a 'salary,' but it is 'income.' The word 'income' is as large a "word as can be used."

Mr. Winn, with his usual candour, has also called my attention to a case in which the Privy Council took a different view in interpreting the provisions of another statute: *Commissioners of Taxation* v. *Teece*.[6] The headnote reads: "Under "the New South Wales Land and Income Tax Assessment "Act, 1895, s. 27, the taxable amount of the respondent's "income was limited to the amount of its income derived "from mortgages; under section 28 (1), certain expenses "incurred by the taxpayer 'in the production of his income' "were to be deducted. *Held*, that on the true construction "of the subsection the respondent was entitled to deduct "all expenses incurred in the production, not merely of its "mortgage income, but of its income as a whole." Lord Macnaghten, who delivered the judgment of the Board in that case, said[7]: "Although perhaps the illustration to which "the learned Chief Justice resorts in support of his view may "be open to criticism, their Lordships are of opinion that the

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[3] (1872) 42 L.J.Ch. 334.

[4] Ibid. 336.

[5] (1882) 51 L.J.Ch. 935, 938.

[6] [1899] A.C. 254.

[7] [1899] A.C. 254, 257.

"principle of the decision is perfectly sound. It is obvious that "the conclusion at which the Commissioners of Taxation arrived "cannot be reached without introducing some limitation or some "qualification which is not to be found in the words of the Act. "The words 'in the production of his income'—that is, in the "production of the income of the taxpayer entitled to the "deductions mentioned in the Act—in their natural and ordinary "meaning, apply to the income of the taxpayer as a whole. "Though it would certainly have led to a variety of nice and "difficult questions, it might have been more logical, it might "have been more in accordance with the fitness of things, it "might have made the scheme of the Act look more symmetrical, "if the taxpayer claiming deduction had been confined to deductions immediately connected with or properly attributable to "his taxable income. But that is not what the Act says. And "it is the duty of the court to construe the Act as they find it." There it was provided in the very statute in which the word "income" was to be considered that there should be a deduction. Mr. Rodger Winn, quite rightly, points out that there is no such provision in the National Insurance Act, 1946.

I have to construe this section according to its natural and ordinary meaning, unless that would lead to some repugnance or absurdity. I am asked, where the word "income" is mentioned, to construe it as "net income" or "income assessable to "income tax" or "income after deduction of expenditure" or words of that kind. It would have been a perfectly simple thing if that had been the intention of Parliament to have put in the word "net" or some such word as that, which would have made it perfectly plain that what Parliament was contemplating here was the net income, or one which was assessable to tax, or some similar phrase. On the contrary, Parliament has simply used the word "income" without adding any words of limitation or qualification. I think I am bound to give that word its natural and ordinary meaning, which is, as Bronson J. said in *People* v. *Niagara Board of Supervisors*[8]: "that which "comes in." I hold that the Minister correctly construed the provisions of this section and that this appeal must therefore be dismissed.

*Appeal dismissed.*

Solicitors: *Solicitor, Ministry of Pensions and National Insurance.*

J. D. P.

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[8] 4 Hill (N.Y.) 20, 23.

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*Nov.* 10, 11,
14, 15,
16, 17;
*Dec.* 20.

Evershed M.R.,
Birkett and
Romer L.JJ.

## MOORE *v.* R. FOX & SONS.

[1953 M. 3091.]

*Negligence—Onus of proof—Res ipsa loquitur—Inexplicable accident—Whether onus discharged if several possible causes proved consistent with absence of negligence—Proof of negligence.*
*Master and Servant.*

A workman in the employ of the defendants, who were cellulose and bronzing specialists, was killed by an explosion while operating a de-rusting tank. The explosion occurred underneath the tank which was filled with liquid chemicals and heated by gas, thermostatically controlled. Underneath the tank was a pilot jet which ignited the burner and there was also a smaller continuously burning jet called a "bleeder." When the temperature in the tank reached the required level the gas supply to the burner turned off automatically, but came on again when the temperature had dropped to a certain level: thus, when the tank was operating normally, the burner then re-ignited from the pilot jet. The explosion was due to an accumulation of unburnt gas exploded by one of the continuously burning jets, but the reason why the gas accumulated was never determined. The administratrix of the deceased sued the employers, alleging that they had been negligent and claiming damages:—

*Held*, (1) that the doctrine of res ipsa loquitur applied (Romer L.J. dubitante); and that the employers had not discharged the onus of proof placed on them merely by showing that the accident was inexplicable; that it was not sufficient to show several hypothetical causes consistent with the absence of negligence and that the accident might have occurred without negligence on their part; but that to discharge the onus they had to go further and either show that they had not been negligent, or give an explanation of the cause of the accident which did not connote negligence by them.

*Scott* v. *London and St. Katherine Docks Co.* (1865) 3 H. & C. 596 followed.

Principle formulated by Asquith L.J. in *Barkway* v. *South Wales Transport Co.* [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460, 471, and dicta of Lord Radcliffe in *Esso Petroleum Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, 92; [1955] 3 All E.R. 864 applied.

Observations of Lord Dunedin in *Ballard* v. *North British Railway Co.*, 1923 S.C.(H.L.) 43, 54, and dicta of Langton J. in *The Kite* [1933] P. 154, 168; 49 T.L.R. 525 explained.

(2) Alternatively, that the onus of proving negligence had rested on the plaintiff, but that she had discharged the onus by establishing that the explosion would not have occurred if proper care and attention had been applied to the apparatus.

Decision of Streatfeild J. reversed.

APPEAL from Streatfeild J.

On February 18, 1953, at about 4.30 p.m. G. F. Moore (hereinafter called the "deceased") was killed almost instantaneously by an explosion on the premises of the defendants, R. Fox & Sons, cellulose spraying and bronzing specialists (hereinafter called the "employers"). The deceased was employed as a phosphater and was attending in the ordinary course of his duties to a substantial metal tank used for "de-rusting." The tank had been designed and manufactured by Messrs. Neil & Spencer Ltd. and had been supplied and fitted by them in the premises. It had been in use continuously since November, 1952. The tank was filled with liquid chemicals maintained at a temperature of 140°F., and the deceased had to put into it the metal objects which required de-rusting, leaving them there for about 10 to 15 minutes each.

The heating and the maintenance of the requisite heat in the tank was achieved by a thermostatically controlled gas burner situated underneath the tank and visible from the outside through a slit in the outer casing of the appliance. The burner was of the bar type, having several vents or ports. The main gas supply of the burner passed through a thermostatically controlled regulator so contrived that when the desired heat was attained the supply was automatically cut off; but when the temperature fell below the required level the supply recommenced. The tank was operated continuously during the day and the gas supply turned on and off about once every 20 minutes. In order to ignite or re-ignite the burner when the supply was flowing, a pilot jet flame, which should have been about six inches in length, was provided near to the burner and was supplied by a separate pipe. There was also a third and much smaller pipe, called a "bleeder," which served to burn away the small overflow of gas from the regulator. There was, finally a contrivance known as a "draught-interrupter," designed to prevent a down-draught from extinguishing the burner flame.

The explosion occurred underneath the tank and blew the various components seriously out of position. It severed the main pipe at one point and put the draught interrupter out of operation entirely. Apart from the deceased, the only person in the room at the time was a Mr. Higgins, a lorry driver employed by the defendants and a friend of the deceased. He gave evidence for the plaintiff that at the time of the accident the deceased was attending to the tank in the ordinary way.

Within one hour after the accident photographs were taken of the apparatus, and on the following day Mr. F. C. Smith, a representative of the North Thames Gas Board, who were the suppliers of the gas at all relevant times, made a preliminary examination of the machine, but was unable to reach any conclusion. The next day, February 20, the "bits and pieces" were taken from the apparatus and separately reassembled for the purposes of tests and examination. They were then sent to the makers. In June, 1953, the plaintiff's solicitors made a request that Mr. L. Whittaker, an engineer, should be allowed to inspect, but on being asked for particulars of the allegations made by them, they did not then press their request and by the time that the writ was issued the "bits and pieces" had, apparently, been destroyed by the manufacturers.

The plaintiff, Florence Margaret Moore, the widow and administratrix of the deceased, suing on her own behalf and that of the two children of the marriage, brought an action against the employers under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging that the death of her husband was attributable to negligence on the part of the employers.

The following summary of the effect of the evidence given at the trial of the action before Streatfeild J. is taken in substance from the judgment of Evershed M.R. It was common ground that the explosion was caused by an accumulation of unlighted gas mixed with air. This accumulation must have been due to a failure in the proper functioning of the pilot jet by reason (*a*) of the deceased having himself tampered with the mechanism, or (*b*) of some kind of obstruction in the pilot pipe, or (*c*) of the pilot pipe being out of position, or (*d*) of some down-draught due to failure in operation of the draught-interrupter, or (*e*) of a combination of two or more of these causes. It was conceded by Mr. C. R. Fox, the manager and a partner in the employer's firm, that the possibility of an explosion from one or other of these causes rendered the machine potentially dangerous, if not properly looked after.

The plaintiff proved to the satisfaction of the judge (and the employers' witnesses did not suggest the contrary) that the deceased was not himself responsible for the explosion. The judge rejected a suggestion by the defendants that the explosion might have been caused by a box, on which it was the deceased's habit to stand when working the apparatus, having obstructed the flow of air to the burner. The plaintiff further proved, accordingly, that the explosion would not have occurred if the machine had been properly maintained. The employers did not call as witnesses their maintenance man, a Mr. Golightly, or the foreman, a Mr. Morley, and it was, therefore, legitimate to infer that although the maintenance man was under the duty to inspect the mechanism weekly to see that it was functioning properly, that duty had not at any relevant time been performed, and that although it had been the duty of the foreman to see that the deceased properly understood the machine and its dangerous potentialities and not otherwise to allow him to be left in charge of it, that duty had not been performed, or, at least, that the employers had forborne to call those witnesses out of fear lest they should so admit in the course of their evidence.

The employers proved (*a*) that there had been no failure or fault in the gas supply; (*b*) that subject to the pipes and the broken pieces of the machine (which were destroyed before the matter came to trial) being assumed to be in the same condition on February 20, 1953, as they were immediately after the accident, they were (except for the draught-interrupter) in fact in good order and condition, that is, they showed no evidence of want of maintenance or of there having been in them any physical obstruction, particularly any obstruction through the presence of tarry or gummy deposit or corrosion, and the suggestion of there having been an obstruction by an air-lock could be disregarded; (*c*) that the mechanism was such as should not have required any overhaul of or tampering with the pipes or jets four months after its installation. Finally, the machine apparatus had apparently worked satisfactorily from the beginning of the day on which the accident occurred until 4.30 p.m., from which it might be inferred that the explosion was due to some sudden and temporary obstruction which happened shortly before the explosion.

Streatfeild J. dismissed the action, and the plaintiff appealed.

*Stephen Chapman Q.C.* and *Roger D. B. Davies* for the plaintiff, the deceased workman's widow. The proper inference to be drawn from the evidence was that the defendants had been negligent, and the case was one to which the rule, or principle, of res ipsa loquitur applies. The propositions stated by Asquith L.J. in *Barkway* v. *South Wales Transport Co.*[1] correctly summarize the principle, and the statement by Singleton L.J. in

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[1] [1948] 2 All E.R. 460, 471.

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*Southport Corporation* v. *Esso Petroleum Ltd.*[2] fits in with those propositions. *Barkway* v. *South Wales Transport Co.*[3] was reversed by the House of Lords[4] on another matter, but the validity of the statement of general principle is unaffected.

The onus of disproving negligence being on the defendants, the question is how they can discharge it, whether they must prove the cause or causes of the accident and show that those causes were inconsistent with negligence on their part or did not necessarily import negligence on their part, or whether, if they cannot establish the specific cause, it is sufficient to put forward a number of possible causes, the one which is most likely being inconsistent with negligence by them. The view that that would be sufficient is based largely on what Langton J. said in *The Kite*,[5] and that in turn was founded on the dissenting judgment of Lord Dunedin in *Ballard* v. *North British Railway Co.*[6] The statement by Lord Dunedin conflicts with the formulation of principle by Asquith L.J. in *Barkway* v. *South Wales Transport Co.*[7] Lord Dunedin said[8] that the plaintiff must show that the accident could not have happened without there having been negligence, but that if the defendant then established that it might have happened without negligence he would have sufficiently discharged the onus on him. The possible explanation might thus be purely hypothetical, and it is submitted that Lord Dunedin was wrong in holding that it would be sufficient to discharge the burden of proof on the defendant. To do that a defendant must prove facts, not theories. In *O'Hara* v. *Central S.M.T. Co. Ltd.*[9] Lord Dunedin's speech was said to be out of harmony with the trend of authority, at any rate in Scotland. In that case it was held that the defendant had to produce legal proof of the cause of the accident—which in Scotland necessitated that there should be at least two witnesses.

By the second limb of Asquith L.J.'s statement of principle, in a case where the doctrine applies, if the defendant cannot prove the specific cause of the accident and show that that cause did not connote negligence on his part, he must show that, whatever might have caused the accident, there had been no fault or want of care on his part, that he had blocked all the loopholes by which negligence could have crept in. That was done in *Woods* v. *Duncan* (the *Thetis* case[10]). Streatfeild J. said in the present case that the rule of res ipsa loquitur was only a rule of evidence and did not give rise to a presumption of negligence, but from the first emergence of the doctrine in *Scott* v. *London and St. Katherine Docks Co.*,[11] and on the general trend of authorities since, it has always been put on the basis that there is a presumption of negligence: see the intervention of Blackburn J. in the argument[12] where, applying what he called an "old pleading "rule," he asked whether the fact of the accident was not sufficient evidence to call upon the defendants to prove that there was no negligence.

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[2] [1954] 2 Q.B. 182; [1954] 2 All E.R. 561; reversed on appeal, sub nom. *Esso Petroleum Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864. (The decision of the House of Lords was given in that case after the arguments had been finished in the present case but before the date of the judgment.)

[3] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460.

[4] [1950] A.C. 185; 66 T.L.R. (Pt. 1) 597; [1950] 1 All E.R. 392.

[5] [1933] P. 154, 168.

[6] 1923 S.C.(H.L.) 43, 53.

[7] [1948] 2 All E.R. 460, 471.

[8] 1923 S.C.(H.L.) 43, 54.

[9] 1941 S.C. 363.

[Evershed M.R. In *Scott* v. *London and St. Katherine Docks Co.*[13] the only judgment delivered was that of Erle C.J., who was in a minority, and the only point in the case appears to have been the construction of the judge's notes.]

*Byrne* v. *Boadle*[14] is an earlier case.

[Birkett L.J. Winfield on Tort, (1954) 6th ed., p. 503, cites *Christie* v. *Griggs*[15] as the first case in which the principle was applied, but says that according to Professor Buckland and Mr. Ashton Cross similar phrases occurred in Cicero.]

In *The Merchant Prince*[16] it was said that it was necessary to show either what was the cause of the accident and to show that the accident was inevitable, or to enumerate all the possible causes and to show that with regard to each cause enumerated the result was unavoidable. That apparently puts the test higher than Asquith L.J. put it when he said that the defendants could discharge the onus if they showed that they had exercised all reasonable care, but in substance it is only saying the same thing.

[Birkett L.J. In *The Merchant Prince*[16] the court was considering the defence of inevitable accident; the considerations applicable there are not necessarily those applicable here.]

There was also a denial of negligence in that case. To some extent the case was put on the footing that unless it could be shown that the accident, that is, a collision in broad daylight, was due to something beyond the control of the defendants, such as a defect in mechanism, it would be a case of res ipsa loquitur. In the circumstances of that case the two limbs of the test as formulated by Asquith L.J. tended to overlap.

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[10] [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420n.

[11] (1865) 3 H. & C. 596.

[12] Ibid. 600.

[13] 3 H. & C. 596.

[14] (1863) 2 H. & C. 722.

[15] (1809) 2 Camp. 79.

[16] [1892] P. 179; 8 T.L.R. 430.

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All these cases conflict with the view that the onus may be discharged by showing a neutral cause of the accident, one which is equally consistent with there having been negligence or no negligence on the part of the defendants. The explanation put forward must be a factual one and not merely a hypothesis based on the opinion of an expert. The statement in Salmond on Torts, (1953) 11th ed., p. 517, founded on *Ballard* v. *North British Railway Co.*,[17] is wrong. The explanation must be an adequate one; it will not discharge the obligation if it is ambiguous; as Devlin J. said in *Southport Corporation* v. *Esso Petroleum Ltd.*,[18] it must be a plausible explanation. A plausible or reasonable cause means the sort of thing which might have happened according to human experience. It must be shown that the accident could reasonably be inferred to have been so caused, not that the suggested cause is, for example, possible according to the rules of chemistry.

If a defendant shows that everything which he did was proper, then the court would hold that the burden on him is discharged.

[ROMER L.J. If he can establish one possible cause of the accident which does not connote negligence on his part, the matter becomes at large and the trial proceeds. It is essential to keep separate the cesser of the presumption and the end of the case.]

The principle is fairly stated in *Easson* v. *London and North Eastern Railway Co.*[19]

*R. H. Forrest Q.C.* and *Ronald E. Hopkins* for the employers, the defendants. This is not a case to which the doctrine of res ipsa loquitur can be applied at all. In deciding whether the happening of this accident " speaks," it is important to remember that at the relevant time, that is, immediately before the occurrence of the damage, the apparatus was in the control of at least three different parties. The defendants were in control of the maintenance and possibly the design; the day to day operation was in the control of the deceased workman in the sense that he was the man who was present all the time and could turn the gas taps on and off. Finally, the Thames Gas Board controlled the flow of gas to the machine. The plaintiff showed only that the gas went into the apparatus without being ignited. At that stage the judge was left with the three possible parties in control, and the occurrence of the accident might " speak " against any of them. Consequently, it cannot be said to put the burden of disproving negligence on the defendants. In *Scott* v. *London*

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[17] 1923 S.C.(H.L.) 43.

[18] [1953] 3 W.L.R. 773, 781.

[19] [1944] K.B. 421.

*and St. Katherine Docks Co.*[20] the accident was to a stranger, but here the deceased man was one of the persons in control of the machine. See also *Woods* v. *Duncan.*[21] In all cases in which it can be said that the doctrine res ipsa loquitur applies, it does so without needing expert evidence. But where, for example, a gas stove blows up, the judge is not entitled to say from his own knowledge that that sort of thing cannot happen without negligence, for the properties of gas are not matters of which the court can take judicial notice; the court requires expert advice, and evidence of hypothetical causes is not only admissible but essential. If it is shown that there are a number of possible causes of an accident, there is no room for the doctrine of res ipsa loquitur. Here only one of the suggested causes could in any circumstances have been the defendants' fault or under their control.

The application of the doctrine of res ipsa loquitur in cases where there are two or more defences put forward was considered in *Tierney* v. *Gupwell (A. J.) (Transport).*[22] In that case it was said that the particular sort of accident would not have happened apart from negligence, and much was made of the fact that a certain crane driver was not called to give evidence, but he was not called because there was no case for him to answer. The same may be said of the failure to call the maintenance man and the foreman in the present case. The plaintiff has not proved her case; the failure to call the two men does not make up for the lack of evidence for the plaintiff.

If the plaintiff had established that the explosion could not have happened unless there was corrosion in the pilot jet, the court would have had to consider whether the corrosion was caused by negligence or not. But here it was shown that the explosion could have been due to any of three different causes. The judge was not justified, therefore, in drawing the inference that it was due to corrosion, and the plaintiff has not, in accordance with what Lord Dunedin said in *Ballard* v. *North British Railway Co.*,[23] established "that the fact of the accident was "relevant to infer negligence." *Ballard's* case [23] was followed in *The Kite.*[24] See also *The Mulbera,*[25] in which the court refused to follow *The Merchant Prince* [26] line of cases, and see also *Langham* v. *Governors of Wellingborough School.*[27] It may well be that Lord Dunedin's speech would not be applied in the road traffic type of case, for in such a case a plaintiff is not concerned with whether a jury would infer negligence from the facts, but he is saying that to drive, for example, on the pavement, is itself a negligent thing to do. In *The Merchant Prince*[28] it could be said that to sail into another vessel in broad daylight was a negligent thing to do. The act itself was negligent; the jury did not have to infer that there had been negligence. In the present case the explosion itself is not the negligence complained of, but it is said, for example, that it was negligent to allow the pipe to become corroded; in such circumstances a jury would be asked to infer negligence from the fact of the accident. This case is not, therefore, within *The Merchant Prince*[28] line of cases.

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[20] 3 H. & C. 596.

[21] [1946] A.C. 401.

[22] [1951] 2 Lloyd's Rep. 55.

[23] 1923 S.C.(H.L.) 43, 54.

[24] [1933] P. 154.

[25] [1937] P. 82; 53 T.L.R. 314.

[26] [1892] P. 179.

[27] (1932) 101 L.J.K.B. 513.

The question whether there has been negligence has to be answered objectively, not subjectively. If the defendant in such a case does what he thinks is right, that is not sufficient, but if for the worst of reasons he happens to comply with what a reasonable man would do, his reasons for so doing would be irrelevant. The expert evidence here is that the machine did not need attention for 12 months; it is immaterial what Mr. Fox thought should have been done.

The only matter which was relevant from the defendants' point of view in seeking to discharge the burden of proof was the condition of the pipes. Nothing was revealed by the detailed inspection carried out on February 20. It might be said that the position may not have been the same then as it was immediately before the accident occurred, but there is a presumption that a state of affairs which existed at point B can, in the absence of evidence to the contrary, be presumed to exist at points A and C, if A and C are at reasonable points of time from point B. What is a reasonable distance of time is a question of fact in each case. The defendants would, of course, only have been liable for a gradual type of blockage, a blockage caused by an accumulation of gummy substance which would probably have left traces after the explosion. They would not have been responsible for an air-lock which might have appeared suddenly and left no visible trace after the explosion. The proper inference is that, as no obstruction was found when the inspection was carried out, there was not, at the moment of the explosion, any blockage in the pipes of a type for which the defendants could have been held liable. Even if, therefore, it had been shown that the defendants had

[28] [1892] P. 179.

been negligent in failing to do any maintenance and that the pipes were liable to become gummy unless they were cleaned, as the evidence is that there was no gum in the pipes, the accident could not be attributed to the defendants' allegedly negligent failure to keep the pipes clean.

In deciding whether the defendants were negligent it is relevant to have regard to what other employers would have thought it prudent to do. The plaintiff called no evidence as to this. It was not pleaded that the deceased workman was not properly instructed in his work, and, consequently, evidence was not called by the defendants on this point. Nor was the point taken that, in the absence of suitable instruction, this was not a safe system of work. [Reference was made to *Wilsons and Clyde Coal Co. Ltd.* v. *English*.[29]]

[EVERSHED M.R. If it is said that the judge was wrong in holding that the accident was not attributable to anything that the deceased workman did, that opens the way to the argument that if he did something wrong he did it because he was not properly instructed how to look after the machine.]

*Stephen Chapman Q.C.* in reply. There is no evidence what happened to the pipes at various stages after the accident; from the scientific point of view there is, therefore, no guarantee that the pipes were in the same condition on the date when they were examined as when the explosion took place. If the defendants were minded to discharge the burden on them they should have shown that they had attained a scientific standard of proof. They have submitted that traces of a blockage, other than that caused by an air-lock, would have been found after the explosion, but that depends on what the blockage was caused by. It might, for example, have been caused by a gradual accumulation of ordinary dirt, a possibility which the judge does not seem to have dealt with. Such an accumulation would have been blown away by the blast down the open-ended pipe, or by the tests carried out after the explosion (if these were done before the inspection—a matter on which the evidence is not clear).

Whatever the experts have said, there must have been a blockage because the explosion occurred. If the cause of the explosion is unsolved the onus is on the defendants to show that the blockage was of a type which negatived any finding that they had been negligent; that is, that it was of a type which reasonable care on their part could not have prevented: *Woods* v. *Duncan*.[30]

[29] [1938] A.C. 57; 53 T.L.R. 944.

[30] [1946] A.C. 401.

They cannot discharge that onus when they have no evidence from the maintenance man or the foreman.

This is properly a case of res ipsa loquitur. The res is the accident, as in *Byrne* v. *Boadle* [31] (the barrel case). There may be many accidents of which one cannot say whether the accident "speaks with a voice" until it is understood; here the plaintiff called the necessary evidence to show that this was an accident which would not have happened if reasonable care had been taken. All the cases (for example, *Southport Corporation* v. *Esso Petroleum Ltd.*[32]), show that the burden of proof cast on the defendant cannot be discharged merely by producing theories as to what might have happened; he must prove facts which explain the accident. The scientific explanations adduced here reached no conclusion at all. [Reference was also made to *The Llanover.*[33]]

*Cur. adv. vult.*

Dec. 20. EVERSHED M.R. stated the facts, commenting that it had been wise of the employers not to pursue the suggestion that the deceased was the author of his own misfortune, for in the circumstances of the case, a failure on his part to appreciate the dangerous potentialities of the apparatus at which he had been required to work would not have assisted them. He reviewed the evidence and continued:

The plaintiff contended that her case fell within the rule or principle known as "res ipsa loquitur," i.e., that the fact of the explosion spoke for itself and led to the conclusion of negligence on the defendants' part unless it could be otherwise explained. Thus, as she claims, the onus was put upon the defendants which in the event, as she argued below and before us, was never discharged. The judge accepted the premise to the plaintiff's argument, i.e., that this was a case to which the formula "res ipsa loquitur" applied; but he concluded, nevertheless, that the defendants had successfully discharged the onus cast upon them. Founding himself largely upon the judgment of Langton J. in *The Kite*,[1] he thought that it sufficed for the defendants by expert evidence (alone) to show possible, that is theoretically possible, ways in which this accident or others like it might happen, and then to say that some, at least, of those possibilities were consistent with absence of negligence.

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[31] 2 H. & C. 722.

[32] [1954] 2 Q.B. 182.

[33] (1945) 79 Ll.L.Rep. 159.

[1] [1933] P. 154; 49 T.L.R. 525.

C. A.
1955

MOORE
*v.*
R. FOX &
SONS.

Evershed M.R.

I have found the case one of perplexing anxiety. The so-called rule or "principle" of res ipsa loquitur has been the subject of many judicial pronouncements both in England and in Scotland. It has, indeed, been somewhat criticized. In the view of Lord Shaw of Dunfermline (in *Ballard* v. *North British Railway Co.*[2]), its title to the designation of "principle" has been largely attributable to the fact of its expression in the Latin tongue. Nevertheless there can, in my view, be no doubt of the validity of the rule or presumption, by whatever name it is called. It has been considered by the House of Lords as recently as the present term in *Esso Petroleum Ltd.* v. *Southport Corporation.*[3] Although, therefore, it cannot be doubted that if the plaintiff can rightly assert, as regards this accident, "res ipsa loquitur," the onus is then thrown upon the defendants to show that there was no negligence on their part or, at least, to give an "explanation" of the accident which is consistent with the absence of negligence, it is far less clear whether the language of Langton J. ought to be taken as justifying the conclusion for which the defendants have here contended, and particularly the proposition that they can discharge that onus upon the basis of what are (in effect) purely scientific hypotheses. In the circumstances I think it right that I should express my own view of the present case both on the assumption, which the judge favoured, that the case was one of res ipsa loquitur, and also on the alternative view that, although at the end of her case the plaintiff might have established a prima facie case of negligence, nevertheless the onus remained throughout upon the plaintiff; so that the question for the determination of the court in the latter alternative is whether, upon the evidence as a whole, the right inference is one in favour of the plaintiff or of the defendants. And, in the latter alternative, I do not forget the point forcibly made by Mr. Forrest that the standard of duty, departure from which will alone amount to negligence, is an objective standard, namely, the standard of the reasonably prudent employer at the date of the accident, and not a standard derived from consideration of the particular precautions which were, in fact, installed in the present case plus the added attraction of wisdom after the event.

It will be necessary, therefore, for me to consider in some detail the evidence produced before the judge. But I will anticipate at once my conclusions. If, as the judge thought, this was a case of res ipsa loquitur, that is, a case in which this accident, having regard to all the circumstances in which it occurred, spoke for itself and led to the inference of negligence, then, with all respect to him, I do not agree with his conclusion that the defendants thereafter discharged that onus by calling four expert witnesses, the result of whose evidence was, after all, that the accident was inexplicable. In the words of one of them (Mr. F. C. Smith) at the end of his re-examination: " I have had some experience, but I cannot tell you how this happened." Second, and upon the alternative hypothesis that the onus of proof rested throughout upon the plaintiff, then I also conclude in the plaintiff's favour: for, in my judgment, upon the whole of the evidence and drawing the legitimate—but I hope not more than the legitimate—inference from the defendants' decision not to call either their maintenance man or the foreman under whom the deceased worked (of whom more hereafter), I think that the plaintiff sustained to the end the case which she had set out to establish and which Mr. Whittaker [the plaintiff's expert witness] supported, namely, that this accident should not, and would not, have happened if proper care and attention had been applied to the apparatus.

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[2] 1923 S.C.(H.L.) 43, 56.

[3] [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864.

I have said that I have found the case one of great difficulty. My anxieties have not, however, been confined to the legal problems to which the case has given rise.

[His Lordship commented on the way in which the case for the defendants had been conducted before Streatfeild J., referring to the failure to call the foreman to give evidence after questions had been put to the plaintiff's expert witness in cross-examination which seemed to indicate that he would be called, and to evidence given relating to the destruction of the vital parts of the apparatus before the matter came to trial and before the plaintiff's expert had had an opportunity of examining them. His Lordship reviewed the evidence given by Mr. Fox as to the dangerous potentialities of the machine and the responsibility of the deceased and went on:] What, then, was the extent of the deceased's responsibility? Mr. Fox, it is true, said that he " thought " that he (Mr. Fox) had taught the deceased when the former ceased himself to work the machine. But it appears to me, particularly in view of the later answers, that when Mr. Fox ceased himself to work the machine, he could only have given a broad explanation of the nature of the job to the deceased: for it is clear that the foreman, Mr. Morley, was put in charge and that it was the foreman's duty to satisfy himself, before even the deceased was allowed to light the machine, that the latter was fully competent to handle the machine safely. It is further clear, in my judgment, that even assuming that the foreman had been shown to have discharged his duty, the deceased's responsibilities never extended to anything except looking after the state of the tank itself and (perhaps) lighting the gas first thing in the morning.

I come, finally, in reference to Mr. Fox's evidence, to what was said about the maintenance man, ultimately identified by Mr. Fox as a Mr. Golightly. In his examination-in-chief Mr. Fox had referred to the duty of the maintenance man. This was, indeed, the first reference to the existence of such a man. When giving his evidence at the inquest, Mr. Fox had made no reference whatever to Mr. Golightly or to any other maintenance provision except the obligation, which he conceived that he himself had, to overhaul the machine after an interval of time which, at the relevant date, had not arrived. Mr. Fox was, naturally, much pressed in cross-examination upon this matter and asked why had he forborne to make any reference to Mr. Golightly? "I have not," he said, "any answer to that "one." I find it unnecessary to consider at any length this part of Mr. Fox's cross-examination. It was, however, in my judgment, made quite clear that, apart altogether from the overhauls which would be called for at infrequent intervals, it was the duty of the maintenance man to inspect the machine regularly once a week, and that he was, or should have been, competent to detect any defect in its proper functioning.

So much, then, for Mr. Fox. In my judgment, so far from tending to any substantial extent to qualify the evidence given on the plaintiff's side, Mr. Fox may be said to have supported it in no negligible degree. He conceded that to his knowledge the machine was one potentially of dangerous characteristics. He conceded that if the machine was properly maintained and looked after no explosion should have occurred. He proved that it was the duty of the maintenance man to inspect the apparatus weekly and the duty of the foreman to supervise the deceased and not to let him take charge of the working of the machine (i.e., the gas apparatus which was part of it), including even the lighting of the gas, unless and until satisfied that the deceased understood the machine and was competent so to be left in charge. There was, however, no evidence that either of these duties had been performed. There was, therefore, no evidence of conduct which, whatever the actual cause of the accident, was in accordance with a proper performance of the duty of care—no evidence, in other words, comparable to that of Lieutenant Woods in *The Thetis.*[4] In all the circumstances it is, in my judgment, the right inference to draw from the absence of the maintenance man and the foreman as witnesses that there had, in fact, been no proper care or maintenance of the machine, and that the foreman had never been satisfied of the deceased's competence and understanding of the machine—or, at least, that the defendants were unwilling to take the risk that these men, if called as witnesses, would have so admitted in cross-examination. It seems to me to follow from my last statement that, even if (contrary to the judge's view) the deceased brought his own destruction upon himself in some way, then he did so because he had never been properly informed as to the potential dangers of the machine and of the necessity, in the interests of his own safety, to avoid doing whatever he did do.

[His Lordship reviewed the evidence given by the four expert witnesses called on behalf of the defendants, referring particularly to that given by Mr. F. C. Smith of the North Thames Gas Board regarding his findings on examination of the pipes and his failure to find anything wrong with the gas supply. This evidence was corroborated by the fifth witness called, a Mr. Newman, a consultant in engineering matters relating to industrial safety. Mr. F. C. Smith suggested several of the possible causes of the accident set out above but in the end said that he was unable to explain it. The evidence of the third witness, Mr. S. Smith, a bachelor of science and one of Her Majesty's inspectors of factories, was purely theoretical as he had not inspected the apparatus. He, too, was unable to explain the accident. The fourth witness, Mr. G. A. C. Stevens, a representative of the manufacturers, gave evidence as to the destruction of the parts of the apparatus and said that the mechanism would not have required any attention for a period longer than that which had elapsed since its installation. His Lordship continued:] Having given my account of the evidence produced to the judge I proceed to state, upon the basis of that evidence, my reasons for the conclusions which I have earlier given. I take first the alternative favoured by the judge, that the plaintiff had rightly said that this was a case of res ipsa loquitur and had, therefore, thrown upon the defendants the onus of explaining the accident so as to absolve themselves from the implication of negligence.

As I understand the law upon this subject which has been expounded in the cases, the so-called rule applies where the res, that is the " thing " itself, without more, leads to the inference of negligence. If, then, this is a case of res ipsa loquitur, it must be because the happening of the explosion, of itself, but in the light of the circumstances in which it occurred, leads to that result. For my part I am disposed to agree in this respect with Streatfeild J. I do not, that is to say, accept the argument of Mr. Forrest that the application of the rule is excluded because the defendants were not themselves at the relevant time in sole control of the machine and of the gas which heated it. This was, after all, a case in which the deceased was employed by the defendants to use this machine (which the defendants had installed and provided for him) for the purpose of his inserting in the tank the pieces of metal to be treated. The foundation of all subsequent authority is found in *Scott* v. *London and St. Katherine Docks Co.*[5] The language of Erle C.J., which is the basis of all that has since followed, was[6]: " But where the thing is shown " to be under the management of the defendant or his servants, " and the accident is such as in the ordinary course of things " does not happen if those who have the management use proper " care, it affords reasonable evidence, in the absence of explana- " tion by the defendants, that the accident arose from want of " care." In my judgment this passage is directly applicable to the facts of the present case; for the thing, that is the machine, was " under the management of the defendant or his servants, " and the accident was such as in the ordinary course of things " does not happen if those who have the management use " proper care "—a fact corroborated by the evidence of Mr. Whittaker. Furthermore, the sum of the defendants' evidence was not to explain the accident but to show that it was inexplicable.

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[4] *Woods* v. *Duncan* [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420n.

Agreeing, therefore, with the judge that this was a case of res ipsa loquitur, I am unable to agree that the defendants so explained the accident as to discharge the onus thrown upon them. In *Barkway* v. *South Wales Transport Co.*[7] Asquith L.J. stated by reference to the facts before him the position as to onus of proof in such cases as follows[8]:—

" (i) If the defendants' omnibus leaves the road and falls " down an embankment, and this without more is proved, then " res ipsa loquitur there is a presumption that the event is

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[5] (1865) 3 H. & C. 596.

[6] Ibid. 601.

[7] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460; [reversed [1950] A.C. 185; 66 T.L.R. (Pt. 1) 597; [1950] 1 All E.R. 392.]

[8] [1948] 2 All E.R. 460, 471.

"caused by negligence on the part of the defendants, and the "plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, "again without more, that the immediate cause of the omnibus "leaving the road is a tyre-burst, since a tyre-burst per se is a "neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a "balance has been tilted one way, you cannot redress it by "adding an equal weight to each scale. The depressed scale will "remain down. . . . (iii) To displace the presumption, the "defendants must go further and prove (or it must emerge from "the evidence as a whole) either (a) that the burst itself was due "to a specific cause which does not connote negligence on their "part but points to its absence as more probable, or (b) if they "can point to no such specific cause, that they used all reasonable care in and about the management of their tyres; *Woods* "v. *Duncan* (*The Thetis*).[9]"

In my judgment Asquith L.J.'s formulation which I have cited is correct and is applicable to the present case. It is, moreover, supported by the language of Lord Radcliffe in the *Esso Petroleum Company* case [10] where he said: "Running a ship on "to the draining wall of a channel in the conditions of weather "which prevailed at the time of the accident is, at any rate, "not the same thing as running into a stationary vessel in the "Mersey. But, assuming that the event was itself prima facie "evidence of negligence and that the respondents had so framed "their case, I do not doubt that the majority of the Court of "Appeal were right in saying that the appellants would not have "displaced that evidence by merely showing that their failure in "navigation was due to a failure in the steering apparatus of the "ship. They would have had to go further and show that they "had not omitted any reasonable precaution to ensure that "failures did not occur in their steering apparatus or in their "control of the steering."

But Streatfeild J. was of opinion that the language of Langton J. in *The Kite* [11] led to a different result. Langton J., in turn, founded himself upon the speech of Lord Dunedin in the House of Lords in *Ballard* v. *North British Railway Co.*,[12] and particularly upon the following passage in that speech [13]: "I think this is a case where the circumstances warrant the

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[9] [1946] A.C. 401.
[10] [1956] 2 W.L.R. 81, 92.
[11] [1933] P. 154
[12] 1923 S.C.(H.L.) 43.
[13] Ibid. 54.

"view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the "defenders can show a way in which the accident may have "occurred without negligence, the cogency of the fact of the "accident by itself disappears, and the pursuer is left as he "began, namely, that he has to show negligence. I need scarcely "add that the suggestion of how the accident may have occurred "must be a reasonable suggestion." After referring to the *Scott* case,[14] and citing the language of Erle C.J., Lord Dunedin concludes, in reference to the passage from Erle C.J.'s judgment which I have already quoted[15]: "I take notice of the word "'explanation'; it is not in absence of 'proof'."

So, in *The Kite*,[16] Langton J. said: "When they have "given that explanation one has still to see whether negligence "has been proved. The explanation may be disbelieved; the "explanation may not at all exclude negligence, but the explanation may leave the matter still in some doubt as to exactly "how the occurrence did happen, but leave an equal possibility "that it happened without negligence as with negligence."

If, by the passage I have last quoted,[16] Langton J. meant to lay it down that in a case of res ipsa loquitur, that is to say, a case in which the onus has been cast upon the defendants, it is sufficient to discharge that onus for them to show that the accident might have occurred for more than one reason some of which reasons are consistent with the absence of negligence, then it seems to me that the conclusion is not justified and is in conflict with the formulation of Asquith L.J.[17] and the language of Lord Radcliffe.[18] I must not be taken to be suggesting that *The Kite*[19] was, therefore, wrongly decided. That was a case in which the plaintiffs, owners of cargo loaded in a barge, sued the owners of the tug which was towing the barge for negligent navigation on the part of the tugmaster since the barge containing the plaintiffs' goods had in the course of the tow come into collision with an arch of a railway bridge, thereby damaging the goods. The tugmaster gave evidence which the judge believed. The effect of that evidence was that, at the critical time, the barge containing the plaintiffs' goods swung outwards from the barge to which it should have been made fast, and that the collision was, in the tugmaster's view, due to that fact. It was accepted by the judge that the navigation by the tugmaster was in no sense careless and, if so, the swinging out of the barge containing the plaintiffs' goods was attributable to the fact that it had not been properly made fast to the adjacent barge, a circumstance which was wholly outside the tugmaster's control and for which, therefore, his company was in no sense responsible. In other words, as I follow the facts and findings in *The Kite*,[20] the defendants there proved by the tugmaster's evidence, as was proved in *The Thetis* case [21] by the evidence of Lieutenant Woods, that, whatever in fact was the cause of the accident, there had been no fault or want of care on the part of the party sued.

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[14] 3 H. & C. 596.

[15] 1923 S.C.(H.L.) 43, 55.

[16] [1933] P. 154, 168.

[17] [1948] 2 All E.R. 460, 471.

[18] [1956] 2 W.L.R. 81, 92.

[19] [1933] P. 154.

It remains for me to say a word on Lord Dunedin's language in *Ballard's* case [22] which I have already quoted. Any speech of that very learned Lord requires and receives the highest consideration. It is not, however, to be forgotten that in *Ballard's* case [22] Lord Dunedin was expressing a dissenting opinion. So much was pointed out by the Court of Session in Scotland in *O'Hara* v. *Central S.M.T. Co. Ltd.*[23] Thus, Lord President Normand said [24] that the observations which I have quoted "cannot . . . be treated as if they stood alone, and I desire to "say, with respect, that I prefer the clearer discussion of res "ipsa loquitur which is to be found in Lord Shaw's speech." [25] See also the language of Lord Carmont [26]: "It seems to me to "be idle to suggest, as has been sometimes done, that Lord "Dunedin was not out of harmony with the majority in his "ideas as to res ipsa loquitur." In my judgment Lord Dunedin, in the passage cited, had rather in mind the circumstances which in any given case do, in truth, give rise to the proposition "res "ipsa loquitur" than to the consequences which properly follow when a case of res ipsa loquitur has once been established by a plaintiff. It must, as I venture to think, always be a question whether, upon proof of the happening of a particular event, it can with truth be said that the thing speaks for itself. The event or "thing" may, or may not, produce that result. Not every accident has, without more, that effect. If, upon a closer analysis of the happening and its circumstances, it does not in truth appear fairly to follow that the proper inference is one of negligence, then the case is not one of res ipsa loquitur at all. In my judgment it was to such considerations that Lord Dunedin was addressing his mind. In light of the other and numerous authorities I cannot think that he intended to lay it down that where the event is shown to be such upon a true analysis that the thing speaks for itself, the defendants can nonetheless discharge the onus upon them by proffering explanations of which the most that can be said is that some, at least, are consistent with the absence of want of care. Such a view would, in my judgment, negative the proposition that the onus (of showing that the accident was not attributable to negligence) had been cast upon the defendants. As Asquith L.J. observed,[27] "When a balance has been tilted one way, you cannot redress it "by adding an equal weight to each scale." I note, moreover, that earlier in his speech Lord Dunedin had said [28]: "The "foundation of all actions of the kind we are considering must "be negligence on the part of the defender, and whether the "expression 'res ipsa loquitur' is applicable or not depends "upon whether, in the circumstances of the particular case, the "mere fact of the occurrence which caused hurt or damage is "a piece of evidence relevant to infer negligence. Thus, there "is a class of cases dealing with injury occurring to a servant "owing to defective plant, which he was obliged to use and "which it was the duty of the employer to supply. In such "cases the fact of an accident may easily be a fact from which "you may infer that the plant was defective, and it will then "be upon the employer to show that the defect was one against "which he could not have guarded." In my judgment the final words of the passage which I have just quoted clearly support the view which I take, and are entirely consistent with Asquith L.J.'s formulation. In my judgment the present is one of the class of cases to which in the last cited passage Lord Dunedin was intending to refer. I think, accordingly, that on the basis that this was a case of res ipsa loquitur the defendants failed to discharge the onus of explanation cast upon them.

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[20] [1933] P. 154.

[21] [1946] A.C. 401.

[22] 1923 S.C.(H.L.) 43, 54.

[23] 1941 S.C. 363.

[24] Ibid. 377.

[25] 1923 S.C.(H.L.) 43, 56.

[26] 1941 S.C. 363, 392.

I turn finally to the alternative question—if this was never a case of res ipsa loquitur, did the plaintiff, upon the whole of the evidence, prove negligence? At the risk of repetition let me summarize the effect of the evidence.

[His Lordship summarized the evidence as set out above and continued:] The summary which I have given of the defendants' evidence is short, but in my judgment they proved no more. And (assuming, again, the absence of any causing or contributing conduct on the part of the deceased), it is at once open to the objection that it proved too much. For, as I have more than once said, the accident undoubtedly occurred, and occurred by reason of a functional failure of the apparatus, a failure not due to fault in the supply or (as I think) to an air-lock. Proof of absence of any signs of gummy deposit or corrosion serves only to eliminate those possible causes of the obstruction or ignition failure, which happened in fact; and I observe that, according to Mr. Stevens' evidence, neither of those two causes should in any event have occurred by February, 1953, and no precaution against them should, in the ordinary course, by then have been taken.

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[27] [1948] 2 All E.R. 460, 471.

[28] 1923 S.C.(H.L.) 43, 53.

In the end, then, it is in my judgment a case of weighing (against the background that we are here concerned with a potentially dangerous machine) on the one hand the evidence given on the plaintiff's side (and conceded by Mr. Fox) that the accident would not have occurred if the apparatus had been properly looked after, *plus* the inferences to be drawn from the failure to call the two vital witnesses on behalf of the defendants; against, on the other hand, the defendants' evidence that on February 20 the mechanism (except the draught-interrupter) appeared to be in good order and condition, and the fact that the explosion occurred at 4.30 p.m.

In my judgment, weighing these matters as best I can, the plaintiff discharged the onus placed upon her. Though the defendants' highly qualified experts could give no explanation of the calamity, the persuasive inference seems inevitably to me to be that from lack of attention some progressive defect in the size or position of the pilot jet flame or, perhaps, some defect in the draught-interrupter had, by the afternoon of the fatal February 18, reached the danger point.

I add that, even if the assumption be not made (as I think it should in accordance with the judge's finding and in the absence of any serious suggestion to the contrary) that the deceased himself neither caused nor contributed to the explosion, the conclusion is no more favourable to the defendants; for the failure of the defendants to call Mr. Morley leads, to my mind, to the inference that the action which (on this view) the deceased took should be attributed to the absence of proper instruction upon the dangerous potentialities of the machine.

It only remains for me to consider Mr. Forrest's point (which is, of course, only relevant if the accident was not due to conduct on the part of the deceased himself) that the proper and objective standard of care did not, according to Mr. Stevens' evidence, require that any maintenance should have been given to the machine so soon after its installation. In my judgment the answer to the argument is threefold. First, Mr. Stevens' evidence of the efficiency of his machine—that its components should require no overhaul or adjustment for many months—could not, as a matter of ordinary common sense and ordinary common prudence, dispense with the obvious duty of an employer, engaging men to work at a potentially dangerous machine, to have the machine regularly watched and to see that it continued in fact to function properly. Second, the duty which I have called "obvious" was recognized as such by Mr. Fox, who appointed a maintenance man to inspect the machine weekly. I can see no reason why the court should not accept the conduct of Mr. Fox as being that of an ordinary prudent employer. And, third, this is all the more so since Mr. Fox did not, in fact, in his evidence rely upon or at all refer to the manufacturers' assurance as fixing or influencing for him the limits of his duty of care; nor was there, as is often the case in actions of this kind, any evidence of the precautions or absence of precautions taken by other employers using this particular machine or other machines like it.

For the reasons which I have given I think accordingly that on any view the plaintiff was entitled to succeed and ought to have judgment for the sum of damages which is, I understand, agreed.

BIRKETT L.J. I have had the opportunity of reading in advance and of considering the comprehensive judgment which the Master of the Rolls has delivered. There is nothing that I desire to add to the judgment. I agree with the conclusions and with the reasoning on which those conclusions are based and I, therefore, would allow the appeal.

ROMER L.J. I am in agreement with the Master of the Rolls that this appeal should be allowed. For myself, however, I am doubtful whether the principle res ipsa loquitur applied to the accident in which the deceased was killed, and I would prefer to rest my conclusion on the view that at the close of the whole evidence which the plaintiff called she had established a prima facie case of negligence against the defendants which they failed by their own evidence to displace. In considering whether res ipsa loquitur applies upon the happening of any particular accident one has to inquire what the "thing" is which, by its very nature, suggests negligence on the part of the person sued.

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Sons.

Romer L.J.

The "thing" in the present case is, I suppose, the explosion of gas in the combustion chamber of the apparatus at which the deceased was working at the time. I greatly doubt whether the proof or admission at the trial that this explosion occurred would in itself have sufficed to place upon the defendants the onus of showing that there had been no negligence on their part; for the explosion might, if nothing were known about it beyond its mere occurrence, quite reasonably be attributed to some cause or causes other than negligence by the defendants, including carelessness on the part of the deceased himself. Mr. Higgins was the only person, apart from the deceased himself, who was present on the scene when the accident occurred, and even after the account of the disaster which he gave in evidence I do not think that it could fairly be said that an inference arose of negligence on the defendants' part. Accordingly, as I say, I prefer to found my concurrence in allowing this appeal on the view that the evidence for the plaintiff, when taken as a whole, established against the defendants a case for them to answer; and for the reasons which the Master of the Rolls has stated, and with which I fully agree, the defendants failed, in my judgment, satisfactorily to answer it.

*Appeal allowed.*

Solicitors: *Trott & Gentry; Carpenters.*

E. D.

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*Dec.* 21.

Barry J.

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*Feb.* 6, 7.

Lord Goddard C.J., Hilbery and Devlin JJ.

## RADIO CORPORATION OF AMERICA *v.* RAULAND CORPORATION AND ANOTHER.

*Evidence — Foreign tribunal — Jurisdiction of English court — Civil action in United States court—Request for examination of witnesses within jurisdiction of English court — Request for production of documents—Distinction between oral examination of witnesses and production of documents—Discovery against persons not parties to foreign suit — "Testimony" — Power of court to make order in respect of material directly relevant to matters in issue in foreign court—Power of court to make order in respect of indirect material for the purposes of discovery—Foreign Tribunals Evidence Act,* 1856 (19 *&* 20 *Vict. c.* 113), *s.* 1.

Two American corporations, the defendants in an action brought in the United States by another American corporation for infringement of patents, alleged by way of defence and cross-claim in that action a conspiracy between the plaintiff corporation and other American, foreign and English corporations, to violate the anti-trust laws of the United States by an arrangement to pool a large number of patents connected with the electronics industry and, by means of licensing and cross-licensing agreements, to parcel out among the alleged conspirators exclusive trading rights in various parts of the globe. In the course of pre-trial proceedings for discovery the defendant corporations obtained from the United States court letters rogatory which asked that a large number of named witnesses, all of whom were members of the boards of two English companies, not parties to the suit in the United States, and "such "officers or agents" of those two and two other English companies "as may have custody or possession of documentary evidence "material to the issues in the . . . proceedings" should be caused to appear before the United States consul in London to give evidence on oath and to produce such documentary evidence in their custody or possession as "is relevant to the issues pending in the "suit."

Pursuant to the letters rogatory the American corporations (acting nominally through their solicitor in this country) sought an order under the Foreign Tribunals Evidence Act, 1856, requiring (A) that the two English companies should produce by their proper officer a number of specified and identified documents, including memoranda, agreements and letters, and also letters and memoranda showing "the steps in the negotiations" of some of the agreements and "all documents mentioned in any of the "foregoing"; and (B) that certain of the named witnesses should give evidence and be examined upon the documents produced and "the conversations, transactions, activities and negotiations "referred to therein." Barry J. in chambers held that under the Foreign Tribunals Evidence Act, 1856, the power to order the production of documents was ancillary to the power to order the examination of witnesses and that, as regards the production of documents, the order sought was in effect an order for discovery which he had no jurisdiction to make, but he ordered that certain of the witnesses named in the letters rogatory who, on the evidence, might have some knowledge of the matters in issue in the suit, should give evidence and that they should produce certain documents, but only those which were specified and identified by the American corporations. On appeal by one of the English companies:—

*Held*, that under the Act there could be no distinction in principle between written documents and oral testimony, for on the true construction of section 1 of the Act of 1856, which itself provided for the production of documents, "testimony" meant testimony relevant to an issue in the matter; the test to be applied, therefore, was not whether what was sought was documentary material or oral material, but whether it was "direct" material immediately relevant to the issue in dispute and such as might be used at the trial, or "indirect" material by way of discovery and testimony for that purpose. Since the testimony sought by the American corporations was "indirect" material relating to pre-trial discovery proceedings in the United States court for the purpose of leading to a train of inquiry which might produce "direct" testimony, and not "direct" material in the nature of proof for the purpose of the trial, it had not been shown that the foreign court was desirous of obtaining "testimony" within the meaning of section 1 and, therefore, the court had no jurisdiction to make the order sought either in relation to the production of the documents or in relation to the oral examination of the witnesses.

*Per* Lord Goddard C.J. The application is in the nature of a "fishing" proceeding which is never allowed in the English courts and that of itself would justify this court in refusing to make the order.

*Burchard* v. *Macfarlane* [1891] 2 Q.B. 241; 7 T.L.R. 526 and *Eccles & Co.* v. *Louisville and Nashville Railroad Co.* [1912] 1 K.B. 135; 28 T.L.R. 67 explained.

Order of Barry J., post, p. 625, varied.

Application under the Foreign Tribunals Evidence Act, 1856.

The applicants, the Rauland Corporation and the Zenith Radio Corporation, two American corporations, were defendants and cross-claimants in an action proceeding in the United States District Court for the Northern District of Illinois, Eastern Division, in which the Radio Corporation of America, as plaintiffs, claimed infringement of patents. The applicants, by way of defence and cross-claim in that action, alleged conspiracy, beginning in 1919, between the plaintiffs and other American and foreign companies to violate, and an actual violation of, the American anti-trust laws by an arrangement to pool patents connected with the electronics industry and by means of licensing and cross-licensing agreements to parcel out among the alleged conspirators exclusive trading rights in various parts of the world.

The respondents to the application were two English companies, the English Electric Co. Ltd., and Electrical and Musical Industries Ltd. (hereinafter referred to as E.M.I.); neither company was mentioned in the pleadings in the action in the United States, but the English Electric Co. Ltd. had since 1946 wholly owned as a subsidiary the Marconi Wireless Telegraph Co. Ltd., which the applicants had named in their defence as one of the foreign companies involved in the alleged conspiracy.

In March, 1955, the applicants petitioned for and obtained from the District Court of Illinois letters rogatory addressed to the appropriate judicial authorities in England and in three other European countries. In their petition they stated that certain depositions and "the obtaining by subpoena or other process of "documents . . . are sought . . . for the purpose of discovery or "for use as evidence in this action, or for both purposes." Judge Igoe in that court stated his reasons for allowing the letters rogatory to be issued in a memorandum in which he pointed out that the principal grounds asserted in support of the motion to set aside the letters rogatory "are that there is no showing by "petitioners that the witnesses sought to be examined have knowledge of any facts or documents relevant to the subject-matter "involved in the pending action; no showing is made by petitioners that all of the documents sought to be obtained and "the facts sought to be elicited are not available in the United "States; and that in no case should the depositions be permitted "until RCA has had an opportunity to examine the witnesses "of counter-claimants to ascertain the nature of the claims for "damage about which information is sought from a foreign "witness. . . . I can find no authority, and none has been cited, "for the proposition that a party must show what relevant and "material evidence proposed witnesses have in their possession "as a condition precedent to taking of depositions of alleged "co-conspirators in an anti-trust case. It seems obvious that "examination of the officers and agents of alleged co-conspirators "may lead to the discovery of relevant evidence, and that is all "that is required. Counsel for RCA appears to concede in his "argument that there may have been contracts with foreign "companies 'dividing up the world,' but stated that in so far "as they did exist they were terminated some twenty years ago. "Cross-claimants are entitled to discovery as to these agreements, "not only to show background and purpose of the conspiracy "alleged but for the purpose of ascertaining the extent to which "they may still be in existence." He then went on to deal with a further argument raised by the plaintiffs, Radio Corporation of America, in their motion to set aside the letters rogatory, and said: "Movants likewise cite no authority for the proposition "that petitioners must first prove that there is no means of "obtaining the documents and testimony sought in the United "States. The petition for letters rogatory was accompanied by "an affidavit stating that counsel for the cross-defendants 'have "'advised counsel for petitioners that the witnesses whose testimony is sought and the documents sought to be obtained by "'process cannot be voluntarily produced by said cross-defendants "'and said witnesses are officers, agents, employees or directors "'of companies named or alleged to be conspirators with cross-"'defendants in this case and are hostile witnesses and would "'not appear voluntarily before an American consular officer, nor

" 'would they voluntarily produce documentary evidence within " 'their possession without the issuance of process by the respective foreign courts.' That affidavit was not controverted nor " was any contrary showing made by movants. The showing by " petitioner appears ample to support the issuance of the letters " rogatory in the circumstances of this case. Movants also urge " that the depositions should not be taken until they have had an " opportunity to examine officers and employees of the counter-claimants to ascertain the nature of the matters to be inquired " into in the foreign depositions. Counsel for petitioner have " set forth in the record the prospective scope of the depositions " and they assert that they have been engaged in taking depositions for a number of months and expect to continue without " interruption for several months more. Ordinarily the party " starting depositions first is permitted to continue without interruption until those depositions have been completed, whereupon " the other side may have its discovery. I see no reason for " departing from that customary procedure in this case, particularly where it might interfere with the pending depositions of " the counter-claimants and might occasion a postponement of " the foreign depositions pursuant to the letters rogatory which " have already been issued."

The letters rogatory, emanating from the President of the United States, recited the particulars of the action and proceeded: " Whereas a certain action is pending [the action is described] " and it having been made known to us that the testimony of " the following witnesses residing in London, to wit," and then, having set out a long list of witnesses who were members of the boards of directors of certain English companies, including the English Electric Co. Ltd. and E.M.I., the letters proceeded to say that it had been shown that the evidence of those witnesses " is necessary in the trial of the issues in the said cause and " without the testimony of whom justice cannot be completely " done between the parties." The letters further stated: " and " whereas it has further been made known to us that correspondence and documentary evidence material and relevant " to the trial of the said issues is in the custody and possession " of agents and officials of the following corporations whose " principal places of business are in London, to wit," and there were set out the names and addresses of four English companies, three of whom were E.M.I., the English Electric Co. Ltd. and the Marconi Wireless Telegraph Co. Ltd.; the letters then continued: " We therefore request you that in

" furtherance of justice you will by the proper and usual processes " of your court cause the witnesses hereinabove named, and " such officers and agents of the hereinabove named corporations " as may have custody or possession of documentary evidence " material to the issues in the instant proceedings, to appear " before the consul of the United States," giving the address and date, " and at such time or times of day or days thereafter as " may be necessary for the completion of the examination of said " witnesses on oral interrogatories to be asked by counsel for the " respective parties to the aforesaid cause, and then and there " to produce such documentary evidence as is in the custody or " possession of said witnesses and is relevant and material to the " issues pending in the suit, and also there to answer on their " oaths and affirmations to the oral interrogatories propounded " to them and each of them, and that you will authorize the " consul of the United States of America in London, England, to " cause such depositions to be committed to writing and returned " to us under cover duly closed and sealed up, together with these " presents."

On April 21, 1955, on an ex parte application made by the applicants (acting nominally through their solicitor in this country, John Stenson) under R.S.C., Ord. 37, r. 54, Master Grundy made an order under the Foreign Tribunals Evidence Act, 1856,[1] in the terms of the letters rogatory that " the . . . " witnesses . . . and such officers and agents of the . . . com- " panies " named in the letters rogatory " as may have custody " or possession of documentary evidence material to the issues " in the proceedings pending in the United States District Court " for the Northern District of Illinois . . . do attend before " . . . a consul or a vice-consul . . . at the American consulate " on a named day " and do there submit to be examined upon oath " or affirmation touching the testimony so required . . . and do

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[1] Foreign Tribunals Evidence Act, 1856, s. 1: " Where, upon an applica- " tion for this purpose, it is made to " appear to any court or judge having " authority under this Act that any " court or tribunal of competent juris- " diction in a foreign country, before " which any civil or commercial " matter is pending, is desirous of " obtaining the testimony in relation " to such matter of any witness or " witnesses within the jurisdiction of " such first-mentioned court . . . it " shall be lawful for such court or " judge to order the examination " upon oath, upon interrogatories or " otherwise, before any person or per- " sons named in such order, of such " witness or witnesses accordingly; " and it shall be lawful for the said " court or judge, by the same order, " or . . . by any subsequent order, " to command the attendance of any " person to be named in such order, " for the purpose of being examined, " or the production of any writings or " other documents to be mentioned in " such order. . . ."

"then and there produce the following documents." There was incorporated in the order a schedule, submitted to the master, which set out a very large number of documents and classes of documents, including an agreement made in 1902, in fact required to be produced.

On June 29, 1955, on an application made on the ground that the order of Master Grundy was, or that its enforcement against them would be, vexatious and oppressive and an abuse of the process of the court, Master Burnand made an order discharging the English Electric Co. Ltd. and the Marconi Wireless Telegraph Co. Ltd. and their directors from compliance with the order; and on June 30, on a similar application, he made an order similarly discharging E.M.I. and their directors.

The applicants appealed from the two orders of Master Burnand, but on October 14, 1955, before the appeals were heard, submitted to the English companies a revised request in more limited terms than those of the order of April 21, asking for the following relief: "(A) Production of documents. . . . an order "that [the companies] do produce by their proper officer the "following documents (the original documents, if in their posses-"sion, or otherwise copies of the documents):" and there was set out a list of specific and identified documents and, in the case of some of the documents, "letters and memorandum . . . "showing the steps in the negotiations of each of the . . . agree-"ments" specified, and also "All documents mentioned in any "of the foregoing. (B) Oral testimony. An order that Sir George "Horatio Nelson and Henry George Nelson," two directors of English Electric Co. Ltd., "do attend and submit to be examined "on oath upon (i) such of the above-mentioned agreements and "documents, and the conversations, transactions, activities and "negotiations referred to therein, as may be within the knowledge "of them, or either of them," the examination also to refer to such of the documents contained in a certain identified bundle of correspondence; and to a number of other documents produced by one Commander Mayer which were again specifically identified.

APPLICATION for the discharge of an order made in chambers by Slade J.

The applicant, Isaac Shoenberg, became a director of E.M.I. in February, 1955. He was not one of the witnesses named in the letters rogatory, but evidence obtained by the applicants from other witnesses showed that he might have some knowledge of facts relevant to the matters in issue in the action in the

United States. On July 8, 1955, on an ex parte application pursuant to the letters rogatory by the applicants, Slade J. made an order under the Foreign Tribunals Evidence Act, 1856, that the present applicant "do attend before the consul of the United "States of America . . . and do there submit to be examined "on oath or affirmation . . ."

The applicant now asked that he be discharged from compliance with this order on grounds similar to those raised by the respondent companies and their directors in their applications to Master Burnand, and he relied upon the fact that he was not named in the letters rogatory.

The two appeals and the application were argued de novo before Barry J. in chambers, and were adjourned into open court for judgment.

*Sir Frank Soskice Q.C.* and *J. G. Le Quesne* for the applicants.

*Sir Hartley Shawcross Q.C.* and *R. J. Parker* for the English Electric Co. Ltd. and their directors.

*Kenneth Diplock Q.C.* and *A. L. Figgis* for Electrical and Musical Industries Ltd. and their directors, and (on the application) for the applicant Isaac Shoenberg.

*Cur. adv. vult.*

1955. December 21. Barry J. read the following judgment, in which he stated the facts and continued: The appeals against Master Burnand's orders and the present application by Mr. Shoenberg cover a considerable amount of common ground, but they were heard separately and I will so consider them. The appeals raise, as I think, important questions concerning the proper construction of section 1 of the Foreign Tribunals Evidence Act, 1856. [His Lordship referred to the pleadings in the American action, to the petition submitted by the appellants to the United States court, and to the memorandum signed by Judge Igoe in that court stating his reasons for allowing the letters rogatory to be issued. He continued:] Counsel for the respondents in the present appeals [the English companies] contend that these documents disclose that the primary object, if not the only object, sought by the petitioners was to make an examination of the witnesses named for the purposes of obtaining discovery against the named companies and individuals resident in this country, who are not parties to the American action. It was suggested by Sir Hartley Shawcross that an "examination "for discovery" of this kind was part of the normal American procedure in a civil action, and that the appellants were now attempting to apply that procedure to witnesses resident outside the jurisdiction of the American courts. There was no evidence as to the American law or practice on this subject, and, indeed, I think it is quite immaterial, but certain passages in Judge Igoe's memorandum certainly appear to indicate that some such practice does in fact exist. If it does, and however beneficial it may be, it is without doubt wholly foreign to the civil procedure in this country.

[His Lordship referred to the letters rogatory as set out above and continued: ] The letters rogatory do not in terms name any specific documents or, indeed, classes of documents, but they request the production of all documents which are "relevant and "material to the issues pending in the suit," a requirement which seems to me to be exactly analogous to that imposed upon the parties to an action in this country when an order for discovery is made. However, a schedule stating the documents and classes of documents in fact required was submitted to Master Grundy on the ex parte application and was incorporated in his order dated April 21, 1955.

Counsel for the respondents submit that this order, read in its ordinary and literal sense, would compel the disclosure of the whole of the trade secrets and other confidential information in the hands of two of the most important companies in the electronics industry in this country (whether those documents be relevant or irrelevant), not only in relation to their dealings with the American companies concerned in this suit, but also with other European companies and even, as I see it, among themselves. Indeed, as I read the order, it would require the English Electric Co. Ltd. to disclose the whole of the arrangements concerning patents, licences and contracts relating to the manufacture or sale of radio and television apparatus, made between themselves and their own wholly-owned subsidiary, the Marconi Wireless Telegraph Co. Ltd. So wide, indeed, are the terms of the order that even, as I thought, Sir Frank Soskice felt a little diffidence in making his application that it should be wholly restored.

The wording of the letters rogatory and the interpretation placed upon them by the applicants are, I think, of considerable significance in considering one of the major issues in these appeals, namely, whether "the real object of the exercise" (as Sir Hartley Shawcross somewhat graphically described it) was to obtain full discovery of all the documents in the hands of the respondents which might have any bearing upon the issues in the American litigation or, as the appellants contend, to obtain the evidence of witnesses likely to be able to depose to facts in issue in that litigation, for use as part of the evidence at the trial.

[His Lordship referred to affidavits filed by the parties and, having said that both the respondent companies had expressed their desire to assist the American court in every way, continued:] The matter was partially heard by McNair J. in July, and thereafter, on October 14, 1955, the revised request, to which I have referred, was submitted to the respondents. Its requirements are certainly very much more limited than those indicated in Master Grundy's order.

[His Lordship described the revised request as set out above and continued:] The respondents' principal objection to the revised request related to the demand for disclosure of documents showing "the steps in the negotiation of each of the "agreements mentioned in the request" and "all documents "mentioned" in any of the documents produced. As to the specified documents themselves, the respondents raised no objection to their production, on payment of the cost incurred, if the court considered that any useful purpose would be served by that production, since it is apparent that the vast majority of these documents have been or can be obtained by the appellants from the Radio Corporation of America, who are a party to the suit.

As to the law which I should apply in considering these matters, I must first of all turn to section 1 of the Foreign Tribunals Evidence Act, 1856, which provides: "Where, upon "an application for this purpose, it is made to appear to any "court or judge having authority under this Act that any court "or tribunal of competent jurisdiction in a foreign country, before "which any civil or commercial matter is pending, is desirous "of obtaining the testimony in relation to such matter of any "witness or witnesses within the jurisdiction of such first-"mentioned court, or of the court to which such judge belongs, "or of such judge, it shall be lawful for such court or judge to "order the examination upon oath, upon interrogatories or "otherwise, before any person or persons named in such order, "of such witness or witnesses accordingly . . ." There then follows a semi-colon which marks the end of the first portion of the section. The second portion of the section reads: "and it "shall be lawful for the said court or judge, by the same order, "or for such court or judge or any other judge having authority "under this Act, by any subsequent order, to command the "attendance of any person to be named in such order, for the "purpose of being examined, or the production of any writings "or other documents to be mentioned in such order, and to give "all such directions as to the time, place, and manner of such "examination, and all other matters connected therewith, as "may appear reasonable and just; and any such order may be "enforced in like manner as an order made by such court or "judge in a cause depending in such court or before such judge."

The only two authorities cited to me which bear directly upon the interpretation of this section were *Desilla* v. *Fells & Co.*[1] and *Eccles & Co.* v. *Louisville and Nashville Railroad Co.*[2] I do not think that I need refer to the facts or judgments in *Desilla's* case.[3] As I understand it, the case establishes that the evidence taken on an examination made under this section need not be confined to evidence which would be strictly admissible in the English court and, secondly, that the master or other person before whom the examination takes place may exercise his discretion as to whether or not he shall allow cross-examination of a witness by the party calling that witness, subject, of course, to any limitations imposed by the order of the court under which the examination is held. Lastly, the case establishes that the English courts should endeavour to comply with the requirements of the foreign court in so far as they properly can.

In the *Eccles'* case[4] the real issue concerned the duties of a servant who was required to produce documents which were, in truth, not in his own possession, custody or control, but in that of his master. There is, however, one passage in the judgment of Vaughan Williams L.J. which throws, I think, considerable light upon the proper interpretation of section 1 of the Act. Vaughan Williams L.J. said[5]: "I do not think that I need go "at length into the provisions of [the Act of 1856]. It is enough "for the present purpose to say that it is an Act which, in the "case of an action pending in the court of a foreign country, "enables that court to request the English court to take part in "the trial of the action brought in the foreign country to this "extent, namely that, on the request of the foreign court, it "empowers the English court to make such an order as will "enable the evidence of a witness in this country to be given "before a commissioner appointed to take his evidence. This is

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[1] (1879) 40 L.T. 423.

[2] [1912] 1 K.B. 135; 28 T.L.R. 67.

[3] 40 L.T. 423.

[4] [1912] 1 K.B. 135.

[5] Ibid. 142.

"not a power given to the court in this country to order discovery "of documents. It is a power to make an order for the taking "of evidence not altogether unlike that which is often made by "the court in this country for the issue of a commission to take "evidence in some foreign country in a case pending in the "English court, though there are certain differences between the "two procedures." For the purpose of the present case, the significant words in this judgment are, of course: "This is not "a power given to the court in this country to order discovery "of documents. It is a power to make an order for the taking "of evidence." Before passing from *Eccles'* case,[6] I think that I ought to refer to an argument submitted to me by Sir Frank Soskice which was based upon the very wide terms of the order for production of documents in *Eccles'* case.[7] It was, however, pointed out by the respondents that the documents in question in that case belonged, in a sense, to the defendants in the action, the Louisville and Nashville Railroad Co., as was stated by Vaughan Williams L.J.,[8] who went on to say[9]: "In order to "prove this, the plaintiffs sought to obtain the production of "documents, which belonged to the defendants, the railroad "company, in the sense that they had, in the course of correspondence or of business, passed between them and the agents "of the steamship company, the firm of whom the appellant "was a servant or an employee, and which were in the possession of that firm. I do not think that it is denied that these "documents were in the possession and custody of that firm." In any event, one thing is clear: in the *Eccles'* case[10] no question was raised as to the compendious nature of the order in relation to the classes of documents to be produced, nor did the appellant in that case suggest that the order in effect amounted to an order for discovery.

I was referred to a further authority decided under an earlier Act, namely, the Evidence by Commission Act, 1843. Section 5 of that Act made provisions for compelling the attendance of witnesses and the production of documents before commissions to take evidence issued in one part of the United Kingdom to be executed in another part. The concluding words of section 5 bear, I think, close similarity to the words of the Act of 1856. Section 5 of the earlier Act provides: ". . . it shall be lawful "for the court or judge to whom such application shall be made

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[6] [1912] 1 K.B. 135.
[7] Ibid. 138.
[8] Ibid. 142.
[9] Ibid.
[10] Ibid.

"by rule or order to command the attendance and examination "of any person to be named or the production of any writings "or documents to be mentioned in such rule or order." A comparison between those words and the wording of section 1 of the Act of 1856 shows, I think, their close similarity.

The case relating to section 5 of the Act of 1843 is *Burchard* v. *Macfarlane, Ex parte Tindall and Dryhurst.*[11] The headnote reads: "In pursuance of a commission issued by the Court of "Session, in an action pending in Scotland with regard to the "sale of a vessel by the defenders to the pursuers, an order was "made at chambers under 6 & 7 Vict. c. 82, s. 5, [the 1843 Act] "that the chairman and secretary of Lloyd's should attend before "the commissioner for examination as to, and to produce the "documents which Lloyd's had under their control answering the "description in the specifications of documents by the pursuers "and the defenders. The specifications stated that the documents called for were correspondence between Lloyd's and their "surveyor at Hamburg, relating to the condition or the surveys "of the vessel between certain dates, and all reports and communications addressed to Lloyd's by their agent at Hamburg "relating to these matters. On appeal against this order:— "*Held* (reversing the decision of the Queen's Bench Division), "that the only process intended to be enforced by the statute "was the production of documents as ancillary to the examination of a witness; that the order amounted to one for discovery "against persons not parties to the action; and that there was "no jurisdiction to make such an order." The whole of the judgments in this case, if they be applicable to the proceedings now before me, seem to me to be extremely illuminating. I shall, however, confine myself to citing two or three passages. Lord Halsbury L.C. said[12]: "Sitting in this court, and treating the "dispute as if it had happened in England, I am bound by the "decision of the Court of Appeal in *Elder* v. *Carter*,[13] and I am "remitted consequently to the inquiry, whether or not this is "in substance an order for inspection and discovery, or whether "it is part of a procedure to examine witnesses in the course of "proof for the purpose of establishing the facts. I do not know "what facts are to be established. I do not know what documents are asked for. I do not know that the parties have ever "condescended upon any particular document, or intimated that

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[11] [1891] 2 Q.B. 241; 7 T.L.R. 526.

[12] [1891] 2 Q.B. 241, 244.

[13] (1890) 25 Q.B.D. 194; 6 T.L.R. 283.

" they have any knowledge of any document existing at all, and " I am led to the conclusion that it is inspection and discovery " that is sought, and not proof. The meaning of the order is, " as I construe the language of this instrument, that the witness " is to be examined if he has got in his possession documents " which may become part of the necessary evidence in the cause. " If that is the meaning of it, it is quite clear that such a roving " order for discovery is not rendered valid because it is limited " to a particular ship and the particular years over which these " transactions are spread. The order of the Scotch Court has " been obtained, not adversely by one of the parties against the " other, but by both of them against a third person who has not " been consulted, and who has never been heard as to whether " or not such an order ought to be made. I am of opinion that " to enforce such an order would be a serious invasion of private " rights."

Lord Esher M.R. said [14]: " The order assumes, on the face of " it, to be made against Tindall and Dryhurst in an action, and " for the purposes of an action, with which they have no relation " whatever, to which they are mere strangers, in respect of which " they can only be called upon as one calls a witness. It is " objected, therefore, on their behalf that the order is beyond " the jurisdiction of the judge, first of all because it is made " upon third parties who have nothing to do with the action in " respect of documents which are not alleged to be the documents " of either party in the action, but which are admitted upon the " affidavits to be the documents and the property solely of these " third parties; and secondly, because it requires them not only " to state whether there are such documents, but to produce " them, and allow them to be read before it is determined " whether they are evidence either on behalf of the plaintiffs or " defendants. What the meaning of this document is I confess " I have myself no doubt. It is ordered that Tindall and Dryhurst do respectively attend before a commissioner for " examination, not for examination in the trial, but for examination ' as to the documents which Lloyd's Register of British and " ' Foreign Shipping have in their possession ' answering certain " descriptions, and those descriptions are of the largest kind; " ' and also that they do respectively produce to the said commissioner the documents mentioned in the said specifications.' " Reading the affidavits and this order, and the summons, I " cannot have a doubt that the real meaning of that last part

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[14] [1891] 2 Q.B. 241, 246.

"of it is, produce them in order that the persons applying for "them may read them and know their contents. The question "comes to be whether such an order is within this Act of "Parliament. In my opinion it is beyond the jurisdiction of "the judge to make the order. He has made an order upon "third persons for discovery, and I take it that that has been "determined in England, at all events, to be beyond the jurisdiction of the judge, and when I come to this Act of "Parliament I shall consider whether it is not the same upon "this Act of Parliament. Even supposing that the documents "had been identified, and that the witnesses had been asked to "produce a document which it is admitted, or shown clearly, is "not the document of either the plaintiff or the defendant, and "had been ordered to produce it for the purpose of its being "read, not at the trial, but before the trial, not before the "examiner as part of the trial but as preliminary to the trial, "then in that case also I should have thought that it is beyond "the jurisdiction of the judge to make the order."

Lastly, I must refer to a passage in the judgment of Fry L.J. where he says [15]: "Therefore it is undoubted to my mind that "the true conclusion is that the order really is, what on its "face it appears to be, an order that Mr. Tindall and Mr. "Dryhurst come before the examiner in order that they may "make discovery of documents. It is analogous to a bill of "discovery against a mere witness. Now is such an order as "that within the meaning of the statute? . . . In my judgment "it plainly is not. That statute enables the court in England "or Scotland or Ireland to direct a commission for the examination of witnesses—that means persons who are able to bear "testimony with regard to the issues in controversy between the "litigant parties. It does not mean that they may be examined "with regard to the possession of documents which may be "relevant to the controversy between the parties. That "observation governs, in my opinion, the whole of the section, "and I think the words at the end 'for the production of any "'writings or documents to be mentioned in such rule or order,' "are only ancillary to the examination of witnesses. The words "may enable the parties to require the production of the documents which the witness produces as a witness; but they cannot "for one moment be stretched so as to enable anyone to obtain "discovery against a witness." Then it is perhaps worth referring to the following paragraph,[16] in view of the point

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[15] [1891] 2 Q.B. 241, 249, 250.

[16] Ibid. 250.

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raised by Sir Hartley Shawcross to which I have already referred: "Mr. Lyttelton put forward a very ingenious argument indeed, "which was this. He said that the law of Scotland must govern "the Scotch commission in England, and the law of England "must govern the English commission in Scotland, and if the "law of Scotland enables you to get discovery against a witness "in Scotland, you must be able in England to obtain discovery "from the witness in England. There are two answers to that "suggestion. In the first place I do not think that it is the "true meaning of the clause; but even if it were, there is no "evidence at all before us that in Scotland discovery can be "obtained against a witness. If that were the Scotch law it must "be borne in mind that the English court must exercise a "discretion. I say without hesitation if I were the judge at "chambers, I never would make an order which enabled a "Scotch commission in England to obtain discovery of documents "from a mere witness in the cause. Therefore I do not doubt "that even if Mr. Lyttelton were right in his contention, and "the law of Scotland is that which he suggests ought to be "gathered from this consent order, the court of England should "not follow it in granting discovery against a mere witness. It "is to be observed that according to the law of England, as it "exists at the present time, it is impossible to obtain discovery "against a witness by any process."

Basing themselves on these authorities, the present respondents [the English companies] contend that the applicants' case is misconceived on two broad grounds: first, that the application is wholly, or in great part, an application for what amounts to an order for discovery against third parties, that is to say, companies and individuals (such as the English Electric Co. and the Marconi Co. and E.M.I. and their directors) who are not parties to the American litigation. In so far as the application is in truth one for discovery, the respondents submit that the court has in fact no jurisdiction to make the order. Secondly, they say that, in any event, the court should exercise its discretion to refuse the order on the ground that the whole application is oppressive and an abuse of the process of the court. Sir Frank Soskice, for the applicants, while not conceding the validity of any objections raised in relation to Master Grundy's order, which he is (nominally at least) seeking to restore, contends that his revised request is unexceptionable and that an order in these limited terms should at least be made. All the prerequisites for an order under section 1 of the Act of 1856 have, he says, been fulfilled and, therefore, the fullest possible assistance should be given to the American court which has expressed a desire for the evidence of the witnesses named and the production of the specified documents.

I turn first to the question of jurisdiction. In considering the true construction of section 1 of the Act, I propose to apply to it the principles enunciated in *Burchard's* case.[17] I have already referred to the similarity between the relevant words in the two Acts. Despite this similarity, Sir Frank Soskice has submitted that there was no real analogy between them. According to his argument, the Act of 1843 contains no provision which can be used for the protection of witnesses, whereas under section 1 of the 1856 Act this purpose can be achieved by the exercise of the power to give directions as to the manner of the examination and all other matters connected therewith. Furthermore, Sir Frank Soskice argued, the compulsory examination of a witness under the Evidence by Commission Act, 1843, only reflects the wish of one or perhaps both of the parties to an action in some part of the United Kingdom, whereas under the Foreign Tribunals Evidence Act, 1856, it is the court of competent jurisdiction in the foreign country which desires the testimony of the witness. Despite these undoubted distinctions, I am unable to find any substantial difference between the effective wording of the two sections, and I am certainly not prepared to hold that persons or corporations within the jurisdiction of the English courts should be subjected to a wider form of inquisition in relation to an action pending in a foreign court than that to which they would be liable if the action were being tried in Scotland or in Northern Ireland or, for that matter, in this country. So far as I am aware, *Burchard's* case [18] has always been regarded as an authority in relation to section 1 of the Evidence by Commission Act, 1859, which relates to Her Majesty's Dominions and Overseas Possessions, and that section is in almost exactly similar terms to section 1 of the Act of 1856. Although I am not, I think, strictly bound by *Burchard's* case,[18] I propose to use it as an authoritative guide to the correct interpretation of the Act now under consideration, and the judgments in that case fortify me in the conclusion to which I should, in any event, have arrived, namely, that any order requiring the production of documents under any of these Acts to which I have referred is ancillary to the order for the examination of witnesses, whose evidence is required at the trial of the foreign action. To repeat the words of Fry L.J.[19]: "The words"—that is to say, the relevant words of the section relating to documents—"may enable the parties to require the "production of the documents which the witness produces as a "witness; but they cannot for one moment be stretched so as to "enable anyone to obtain discovery against a witness." Indeed, I think that the judgments in *Burchard's* case [20] provide a foundation for—they certainly enlarge upon—the words of Vaughan Williams L.J. in *Eccles'* case,[21] to which I have already referred: "This" (namely, section 1 of the 1856 Act) "is not a power "given to the court in this country to order discovery of documents. It is a power to make an order for the taking of "evidence."

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[17] [1891] 2 Q.B. 241.

[18] Ibid.

When this principle is applied, as I think it must be applied, to the present appeals, it is, I think, apparent that any order made upon "such officers and agents of the respondent companies as may have custody or possession of documentary "evidence material to the issues in the United States action," is quite outside the jurisdiction of the court and is bad. In the absence of any evidence, or even suggestion, that any of these officers (who, in all probability, are purely administrative officials in the secretarial offices of the companies) could or might be material witnesses in the action, an order in these terms is an order for discovery, and nothing more and nothing less. As under the Evidence by Commission Act, 1843, I hold that under the present Act the power to make an order for "the production of "any writings or other documents" is ancillary to the power to make an order for the examination of witnesses, and that the court has no power to order what is, in effect, discovery against a witness or to call a witness for examination merely to obtain discovery or to examine him upon the documents which may be in his possession or control. Should I be wrong in my view on the question of jurisdiction, I am quite satisfied that, as a matter of discretion, Master Grundy's order, in so far as it relates to the production of documents, cannot be supported. The enforcement of such an order against any company or person not a party to the action would, I think, be grossly oppressive when judged by the standards of our own civil procedure, and I do not propose to judge it by any other standard. I also think that it would be oppressive to enforce the modified request, in so far as it requires the disclosure of documents relating to the "steps in the

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[19] [1891] 2 Q.B. 241, 250.

[20] [1891] 2 Q.B. 241.

[21] [1912] 1 K.B. 135, 142.

"negotiation of any of the agreements" mentioned in the request or "documents mentioned" in any of the documents specified in the request.

I am, of course, anxious to render every possible assistance to the courts of the United States, but I feel confident that the District Court of Illinois will not regard it as a breach of the comity which should and does exist if I decline to grant a form of relief against a company or individuals within the jurisdiction of this court which could not be obtained by a litigant in Scotland or Northern Ireland or, as I think, could not be obtained at the request of the court in any part of the British Commonwealth.

The position of the witnesses named in the letters rogatory is, of course, wholly different, and here I think my discretion is unfettered. It would, in my judgment, be oppressive, and grossly oppressive, to order the attendance for examination of all the persons mentioned in the letters rogatory, namely, almost every member (including, incidentally, certain deceased members) of the boards of directors of both the two English companies, English Electric and its subsidiary the Marconi company and E.M.I. On the other hand, I think that I should be wrong in refusing to make an order which would enable facts relevant in the American action to be proved by parol evidence taken in this country. Both the respondent companies have made offers as to the production of witnesses which were, I think, entirely reasonable, but I am satisfied that, at this stage at least, no satisfactory solution can be arrived at except as a result of an order of this court. I do not think that I should substitute my opinion as to the identity of witnesses likely to have some knowledge of relevant facts for that of the American court, and in consequence I am satisfied on that and other grounds that any order made by this court should be limited to persons who are among those named in the letters rogatory, such persons being, of course, entitled to refuse to answer questions which may tend to incriminate them under the laws of this country or the United States. On the whole, the evidence satisfies me that Sir George Horatio Nelson and Mr. H. G. Nelson may both have some knowledge—I am far from saying detailed knowledge—of the matters in issue in the American action. The applicants' revised request does not ask for the examination of any witness on behalf of E.M.I., but this omission is, I think, explained by the order of Slade J. for the examination of Mr. Shoenberg, which order Mr. Diplock now invites me to discharge. In view of the conclusion which I have reached on Mr. Shoenberg's application, I think that I should go back to Master Grundy's order which names, among others, Mr. Leonard John Brown, a gentleman who admittedly may have some knowledge of the matters in question.

Therefore, in my judgment, these appeals should be allowed to the following very limited extent: First, Sir George Horatio Nelson, Mr. H. G. Nelson and Mr. Leonard John Brown must attend for examination on the subject-matters referred to in section B of the revised request dated October 14, 1955, and must produce such of the documents specified in this request as upon notice, given a certain number of days (and I shall indicate the number of days after hearing counsel) before the examination, the applicants may require, other than documents showing the steps in the negotiation of the agreements referred to and the documents mentioned in the documents produced, unless these other documents are specifically identified in such notice. Secondly, the examination of these gentlemen is to be conducted before a master of the Supreme Court, and the witnesses are to be examined in the manner prescribed by the procedure of the English courts for the examination of witnesses in chief, unless the master in his discretion shall consider it proper to allow cross-examination on any ground which would justify the exercise of such discretion in a civil court in this country. Thirdly, the expenses of witnesses are to be met by the applicants under section 4 of the Foreign Tribunals Evidence Act, 1856, and the applicants are to bear the reasonable expense of and incidental to the production of the documents specified in their notice, any question as to amount being determined by the master before whom the examination is held. Fourthly, there must be liberty to apply. Liberty to apply is of particular importance in this case because, should it transpire that the deposition of witnesses taken before a master of the Supreme Court and duly authenticated and certified is not evidence acceptable to the American Court, this order must not be frustrated, and the applicants would be entitled to return to the court and to ask for a variation of it, should that be found to be the true position. As I understand it, I do not think that is the position, but I am wholly unacquainted with American law or procedure on this matter.

I must now turn to Mr. Shoenberg's application, which, in my judgment, succeeds. It is unnecessary for me to refer in detail to the evidence, as I am satisfied that, had he heard the arguments addressed to me on Mr. Shoenberg's behalf, Slade J. would not have made the order that he did. When I say this, I do not, of course, for one moment suggest that the facts and arguments, as known to him, were not fully and frankly presented to the judge on the ex parte application. On a full examination of the facts and law, I have, however, no doubt that the court was without jurisdiction to make any such order. As Mr. Diplock has put it, I am satisfied that there is no dichotomy between the first and second parts of section 1 of the Act. I accept his suggestion that the first part of the section was enacted to enable the court to order an examination upon oath by some person before whom an oath could not otherwise be lawfully administered. Section 3 of the Act, on which Sir Frank Soskice relied, does not, in my judgment, in any way tend to invalidate this view. The latter section is, I think, only a consequential provision legalizing the administration of the oath by the person authorized to take the examination. On its true construction, the second limb of section 1 of the Act of 1856 applies only, in my opinion, to a witness whose testimony the foreign court has expressed a desire to obtain. That expression of desire may be proved by various means, but it must, I think, relate to a named witness or, at the very least, to a witness in a named class. Any other construction would lead, I think, to a roving inquisition to which there might virtually be no end. It is true that the evidence already elicited shows that Mr. Shoenberg may have some knowledge of some relevant facts, but the American court has not desired his evidence, unless it can be said, as was suggested, that it desired the evidence of every person and company resident in the United Kingdom who might be able to throw any light on the matters in issue in the American action. The evidence of Sir Ernest Fisk has, for example, shown that Mr. Shoenberg may come within this class. If Mr. Shoenberg's evidence were to be taken, it might, in its turn, disclose the identity of some other person who could be included in it, and so on, as I think, almost ad infinitum.

Sir Frank Soskice sought to support the order on another ground. He submitted that Mr. Shoenberg was, in fact, a person named in the letters rogatory as being an "officer or "agent" of E.M.I. "who may have custody or possession of "documentary evidence." The short answer, as I think, to this point is that, if it is well founded, Mr. Shoenberg was a person covered by Master Grundy's order, from which E.M.I. were discharged by Master Burnand's order dated June 30, 1955. In those circumstances, the ex parte application to Slade J. was, on this assumption, an indirect attempt to appeal from the order of Master Burnand. This application must, I think, clearly be allowed, and Mr. Shoenberg must be discharged from compliance with the order made on July 8, 1955.

[His Lordship, having heard counsel, fixed the length of notice for production of documents specified in the request at 28 days.]

*Appeals allowed in part.*
*Application allowed.*

The English Electric Co. Ltd., Marconi Wireless Telegraph Co. Ltd., and the directors appealed. An appeal by E.M.I. and a cross-appeal by the applicants were set down but were withdrawn before the hearing.

*Sir Hartley Shawcross Q.C.* and *R. J. Parker* for the appellant companies and directors. There is no power under section 1 of the Foreign Tribunals Evidence Act, 1856, to order discovery: see *Eccles & Co.* v. *Louisville and Nashville Railroad Co.*[1] The authorities show that under section 5 of the Evidence by Commission Act, 1843, the power to order production of documents is ancillary to the power to order the attendance of witnesses. Section 1 of the Foreign Tribunals Evidence Act, 1856, is in the same language as section 5 of the Act of 1843; it was not intended to make new law or to give additional discovery, and there is, therefore, no power under section 1 to make an order for the production of documents against persons not parties to the foreign suit. The order made by the judge is, in effect, an order for discovery; under it it is open to the applicants to serve notice requiring the witnesses to produce documents and to examine them upon those documents and upon other documents mentioned in the course of the examination. Specifying the documents to be produced does not make it any the less an order for the production of documents in the first place; the witnesses are to be examined in relation to the documents, and without the documents there would be nothing for the witnesses to be examined about.

"Testimony" in section 1 of the Act of 1856 is confined to testimony in relation "to such matter," that is, the suit in the foreign court; what is sought to be obtained under this application is not testimony in that sense. The letters rogatory in fact ask for discovery, but the law of the United States in respect of discovery goes much further than the law of this country. The memoranda of Judge Igoe and the letters rogatory show clearly that the purpose of the applicants is not to procure testimony which will be used in, or which is necessary for the purposes of, the trial of the suit in the United States, but merely to "fish" and to see if some case can be proved; they are not asking for the testimony of witnesses relevant to an issue in the suit but for the examination of witnesses which might lead to relevant evidence and the discovery of witnesses.

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[1] [1912] 1 K.B. 135; 28 T.L.R. 67.

If there was jurisdiction to make the order, it was one which as a matter of discretion should not have been made, for it is oppressive and an abuse of the process of the court. Discovery as known to the United States courts is a process unknown to our law, and so far as the procedure of our courts is concerned is mala fides. Furthermore, the United States discovery procedure is being invoked in a suit brought under the United States penal regulations, under which parties such as the English companies and their directors might be penalized in the United States in respect of agreements which are legal in this country. It is clear from the memoranda that the applicants' object is to obtain evidence of an incriminating nature and to prove conspiracy. It is one matter for a witness who has gone voluntarily to an examination to object to certain questions on the ground of incrimination, but it is a very different matter for the court, knowing that the object of the examination is to obtain incriminating evidence, to order that examination. The objection might be overruled and witnesses ought not to be put in the peril of the court finding that they have refused to obey an order of the court: see *In re Maville Hose Ltd.*[2]

*Sir Frank Soskice Q.C.* and *J. G. Le Quesne* for the applicant American corporations. The jurisdiction under section 1 of the Foreign Tribunals Evidence Act, 1856, arises directly it is shown that a foreign court "is desirous of obtaining the testimony" of a witness in this country. Once there is jurisdiction, it should be exercised; it is a question of comity, and unless there is some obstacle the court should do what it can to assist the foreign court: see the judgment of Vaughan Williams L.J. in *Eccles & Co.* v. *Louisville and Nashville Railroad Co.*,[3] citing a passage from the judgment of Cockburn C.J. in *Desilla* v. *Fells & Co.*[4] If there is jurisdiction the matter becomes a question of the discretion of the trial judge, with which this court is normally reluctant to interfere. In this case it is shown that a foreign court is desirous of obtaining the testimony of particular persons in relation to the issues in the action, for the letters rogatory which the applicants produce before the court say so in terms.

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[2] [1939] Ch. 32, 38; 54 T.L.R. 1056; [1938] 3 All E.R. 621.

[3] [1912] 1 K.B. 135, 144, 145.

[4] (1879) 40 L.T. 423, 424.

[LORD GODDARD C.J. The court has to look at the substance of the matter.]

The expression " discovery " in the memoranda of Judge Igoe and in the letters rogatory does not necessarily show that the purpose of the application is to obtain " discovery " in the sense used in the authorities. The effect of the decisions in *Burchard* v. *Macfarlane*[5] and *Eccles & Co.* v. *Louisville and Nashville Railroad Co.*[6] is only that " discovery " in the sense of a general order against a third party to disclose documents may not be made. In *Burchard* v. *Macfarlane*[7] the production of specific individual documents was allowed, and if such documents may be ordered to be produced, then questions can be asked about them.

The judge refused to order the production by officers of the companies of any documents in their possession which might be relevant to the issues in the American suit, because that clearly would be an order for discovery, but he held that the directors were in a different position because they might have some knowledge of the actual transactions, and, therefore, ordered that they should give evidence with regard to the transactions evidenced and contained in the documents identified; the order that they should produce their copies of the agreements is merely ancillary to that. Such an order is directly within the scope of section 1 as qualified by the principles in *Burchard* v. *Macfarlane*.[7]

Were that part of the order relating to the production of documents struck out the directors could still be examined upon the transactions; the mere fact that the judge also ordered the production of documents does not make that part of the order relating to oral testimony bad.

[DEVLIN J. What is the distinction between material obtained by oral questions and answers and material obtained by discovery of documents? On the authorities the distinction is between " direct " discovery, that is, discovery of matters relevant to the foreign suit, and " indirect " discovery; it is the latter which will not be allowed.]

The discovery ordered by the judge was discovery of " direct " material, because he found that the directors had knowledge of matters relevant to the suit; the applicants, therefore, are entitled to have their evidence, both oral and written. What would be

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[5] [1891] 2 Q.B. 241; 7 T.L.R. 526.

[6] [1912] 1 K.B. 135.

[7] [1891] 2 Q.B. 241.

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"indirect" material in the hands of an officer of a company is "direct" material in the mouth of a director who is in medios res and can say what was done under the agreements.

It is unlikely that an English director would be proceeded against in the United States. Section 5 of the Act shows that it would be no bar to the jurisdiction if questions might be asked which are of an incriminating nature in a foreign court; that is a necessary concomitant of this jurisdiction. A director can be asked questions in the English courts which might incriminate his company. If the attendance of a director in such a case can be required in our courts by the issue of a subpoena, the courts can order the attendance of a director in order to see justice done in a foreign court.

[Lord Goddard C.J. A director cannot produce documents without the authority of the company. The company might refuse to allow him to produce them.]

Whether or not the documents are produced the examination of the directors can proceed, because they can be asked about the documents and the purpose of the agreements. It is no answer to this application to say that any order made might in part be frustrated.

There is no objection either in jurisdiction or in discretion to the order made by the judge. It is not an order for discovery in the sense in which that word is used in *Burchard* v. *Macfarlane*.[7] To refuse this order would be to deny all relief on the letters rogatory and would be wrong. Furthermore, it is submitted that the court has power on this application to order the companies, by their proper officers, to produce the documents.

Lord Goddard C.J. I will ask Devlin J. to give the first judgment.

Devlin J. This case concerns the proper construction of section 1 of the Foreign Tribunals Evidence Act, 1856, which provides: "Where, upon an application for this purpose, it is "made to appear to any court or judge having authority under "this Act that any court or tribunal of competent jurisdiction in "a foreign country, before which any civil or commercial matter "is pending, is desirous of obtaining the testimony in relation to "such matter of any witness or witnesses within the jurisdiction "of such first-mentioned court, or of the court to which such "judge belongs, or of such judge, it shall be lawful for such court

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[7] [1891] 2 Q.B. 241.

"or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such "order, of such witness or witnesses accordingly." That is the first limb of the first section, and the second limb goes on to say: "it shall be lawful for the said court or judge, by the same order, "or for such court or judge or any other judge having authority "under this Act, by any subsequent order, to command the "attendance of any person to be named in such order, for the "purpose of being examined, or the production of any writings "or other documents to be mentioned in such order."

That section has been invoked by the applicants in this case, the defendants in an action which has been proceeding in the District Court of Illinois for some very considerable time, who desire to obtain from certain witnesses in this country information, and originally they desired to obtain documents, in order to assist the proceedings in the District Court of Illinois.

It is necessary to indicate generally the present stage of those proceedings; they are concerned with discovery. We have not had any evidence of American law and practice in relation to discovery, but what we need for the purposes of this case can be sufficiently ascertained from the documents that have been put in front of us. The essential principles of discovery in the United States do not seem to be very different from the principles in this country; that is to say, discovery is not merely limited to the obtaining, by means of disclosure, of such material as may be strictly relevant to the issues in the action such as might be admissible on the hearing of the action, but it covers also the obtaining of material which might lead to a line of inquiry which would itself disclose relevant material. It might be convenient for the purposes of this judgment if I refer to the first as "direct" material, that is, material which might be put in evidence in the action, and to the second as "indirect" material.

Recent cases in this country—for example, *Board* v. *Thomas Hedley & Co.*[1]—have shown that discovery of documents may sometimes be obtained not only because they are relevant in the case itself but because they may fairly lead to a line of inquiry which would disclose relevant material, but it is plain that that principle has been carried very much further in the United States of America than it has been carried in this country. In the United States of America it is not restricted merely to obtaining a disclosure of documents from the other party to the suit, but there is a procedure, which might be called a pre-trial procedure, in the courts of the United States which allows interrogation not merely of the parties to the suit but also of persons who may be witnesses in the suit, or whom it may be thought may be witnesses in the suit, and which requires them to answer questions and produce documents. The questions would not necessarily be restricted to matters which were relevant in the suit, nor would the production be necessarily restricted to admissible evidence, but they might be such as would lead to a train of inquiry which might itself lead to relevant material.

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[1] [1951] 2 T.L.R. 779; [1951] 2 All E.R. 431; [1951] W.N. 422.

It is that pre-trial procedure, the obtaining of depositions from witnesses with a view to discovery, which the District Court at Illinois is at present engaged upon, and accordingly the defendant corporations, the present applicants, applied to that court for process which under English law they could not possibly get in order to obtain what is in effect discovery from witnesses in this country. In accordance with the ordinary American procedure, they were allowed to obtain that process and the application before the court, therefore, is not an application to examine witnesses for the purpose of their evidence being used directly in the suit but to examine witnesses in connexion with the discovery proceedings.

Before the court has any jurisdiction to grant this application it must be made to appear that the foreign court is desirous of obtaining " testimony in relation to such matter " within the meaning of section 1 of the Foreign Tribunals Evidence Act, 1856, and the question that we have to determine is whether this testimony which it is sought to obtain is " testimony " within the meaning of the statute. Some authority is available upon the meaning of the Act, and authorities, which Sir Frank Soskice, who appears for the applicants, does not in this court challenge, show that he could not ask for discovery of documents. That was made clear by Vaughan Williams L.J. in *Eccles & Co.* v. *Louisville and Nashville Railroad Co.*[2]; he said[3]: " It is enough " for the present purpose to say that it is an Act "—that is the Foreign Tribunals Evidence Act, 1856—" which, in the " case of an action pending in the court of a foreign country, " enables that court to request the English court to take part " in the trial of the action brought in the foreign country to this " extent, namely that, on the request of the foreign court, it " empowers the English court to make such an order as will " enable the evidence of a witness in this country to be given

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[2] [1912] 1 K.B. 135; 28 T.L.R. 67.

[3] [1912] 1 K.B. 135, 142.

"before a commissioner appointed to take his evidence. This "is not a power given to the court in this country to order "discovery of documents. It is a power to make an order for "the taking of evidence." In that case all that was being considered was the discovery of documents, and it is plain that the view of the court was that the testimony to which the Act referred could not include the discovery of documents. Equally, in my judgment, it could not include examining witnesses in order to ascertain what certain documents contained, or in order to ask them questions as to matters arising out of or relating to the documents. The distinction is not whether what is to be obtained is documentary material or oral material. The distinction is whether it is a process by way of discovery and testimony for that purpose or whether it is testimony for the trial itself.

That distinction is brought out most clearly in *Burchard* v. *Macfarlane, Ex parte Tindall and Dryhurst*,[4] a case not on the section which this court is now considering, but on section 5 of the Evidence by Commission Act, 1843, a very similar Act, which dealt with the obtaining of evidence in England or in any parts of the United Kingdom for the purpose of a court in another part of the United Kingdom, such as obtaining evidence in Scotland for the purposes of the English court. The distinction that I am seeking to make was, I think, made quite clearly in all the judgments in that case. Lord Halsbury L.C. said[5]: "I am remitted consequently to the "inquiry, whether or not this is in substance an order for "inspection and discovery, or whether it is part of a procedure "to examine witnesses in the course of proof for the purpose of "establishing the facts." Then he said[6]: "I am led to the "conclusion that it is inspection and discovery that is sought, "and not proof." Lord Esher M.R. said[7]: "Even supposing "that the documents had been identified, and that the witnesses "had been asked to produce a document which it is admitted, or "shown clearly, is not the document of either the plaintiff or the "defendant, and had been ordered to produce it for the purpose "of its being read, not at the trial, but before the trial, not "before the examiner as part of the trial but as preliminary to "the trial, then in that case also I should have thought that it "is beyond the jurisdiction of the judge to make the order." Fry L.J. said[8]: "It is analogous to a bill of discovery against

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[4] [1891] 2 Q.B. 241; 7 T.L.R. 526.

[5] [1891] 2 Q.B. 241, 244.

[6] Ibid. 245.

[7] Ibid. 247.

[8] Ibid. 250.

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Radio Corporation of America v. Rauland Corporation.

Devlin J.

"a mere witness. Now is such an order as that within the "meaning of the statute . . .? In my judgment it plainly is "not. That statute enables the court in England or Scotland "or Ireland to direct a commission for the examination of "witnesses—that means persons who are able to bear testimony "with regard to the issues in controversy between the litigant "parties. It does not mean that they may be examined with "regard to the possession of documents which may be relevant "to the controversy between the parties."

In that case the distinction is made plain between discovery or "indirect" material on the one hand and proof or "direct" material on the other hand, and that is the true distinction with which one must approach the word "testimony" in this Act. Testimony which is in the nature of proof for the purpose of the trial is permissible. Testimony, if it can be called "testimony," which consists of mere answers to questions on the discovery proceeding designed to lead to a train of inquiry, is not permissible. Into which category does the present fall? It is perhaps enough to say that it is plain from what I have said of the nature of the proceedings in the court of Illinois that they fall into the latter category; they are pre-trial proceedings, proceedings by way of discovery. But if there be any doubt about that I do not think that one need do more than to look at the reasons which Judge Igoe, in the District Court of Illinois, gave when he granted the letters rogatory in this case. One passage is sufficient for my purpose. He said: "I can find "no authority, and none has been cited, for the proposition that "a party must show what relevant and material evidence "proposed witnesses have in their possession as a condition "precedent to taking of depositions of alleged co-conspirators in "an anti-trust case. It seems obvious that examination of the "officers and agents of alleged co-conspirators may lead to the "discovery of relevant evidence, and that is all that is required." That shows, I think, plainly enough what the object of this procedure is.

An application for the enforcement of the letters rogatory was made to Master Grundy and he made the order ex parte. An application was made to Master Burnand to discharge the order and upon hearing argument he discharged it. The applicants appealed from that order of Master Burnand and their appeal was very largely unsuccessful. What the applicants sought for was the discovery or disclosure of a large number of documents. They had originally sought for them in the very widest terms, documents which merely by a general description might relate to the issues in the action. In the course of the proceedings before the judge in chambers they limited that to a specified number of documents, and they sought from the English Electric Co. Ltd. and the Marconi Wireless Telegraph Co. Ltd. disclosure of those documents. That was in Part A of the request as limited. In Part B they sought for oral testimony and they asked for an order " that Sir George Horatio " Nelson and Mr. Henry George Nelson "—two out of the many directors named in the original letters rogatory—" do attend and " submit to be examined upon oath upon (i) such of the above- " mentioned agreements and documents, and the conversations, " transactions, activities and negotiations referred to therein, as " may be within the knowledge of them, or either of them " and then various other classes of documents were enumerated. Barry J. disallowed the appeal to a very considerable extent in that he did not allow any part of the order that required the companies to give discovery of documents, but he did allow, subject to certain safeguards and conditions, that part of Part B of the request which required Sir George Nelson and Mr. Nelson to give oral testimony, and he provided that the applicants should be allowed to specify any of the documents that they had listed in Part A and to require Sir George Nelson or Mr. Nelson as directors of the company to produce them, provided that notice of 28 days before the examination was given.

I dealt at some length with the principles which affect both parts of the application because, in my judgment, they are quite indistinguishable, and it is only when one sees what is the true principle that one sees how indistinguishable they are. Once it is accepted that an order of this sort may not be made so far as documents are concerned it appears to me to follow that it cannot be made so far as oral testimony is concerned. The relevant distinction is not between written documents and oral testimony. If the testimony happened to be direct testimony which was immediately relevant to the issue it could not matter whether it was in a document or not. If the document was the best evidence then the document would have to be produced. The section itself provides for the production of documents. When in the *Eccles* [9] case and similar cases Vaughan Williams L.J.[10] and the other judges are referring to discovery or to inspection on discovery they are not meaning that all forms of production of any document will be disallowed because the section itself provides for production. What they are saying is that, discovery in the sense of discovery of indirect material is not permissible. That, in my judgment, is the true distinction.

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[9] [1912] 1 K.B. 135.

[10] Ibid. 142.

Accordingly, I think that Sir Hartley Shawcross is right in his submission that the judge, having disallowed the production of the documents, ought logically to have gone on and to have disallowed the order for the examination of Sir George Nelson and Mr. Nelson because exactly the same principle applies to both. If he had not power to do one he had not power to do the other, and the reason why he had not power to do it was because it was not made clear to him that the foreign court was desirous of obtaining the "testimony in relation to such matter" within the proper construction of the section. On the proper construction of the section the words "in relation to such "matter," mean as evidence which may be used at the trial and not in proceedings for inspection and discovery before the trial.

So far as the rules of evidence are concerned, whether the evidence is relevant or not would depend upon the rules of evidence that are appropriate in the foreign court. Sir Hartley Shawcross has not sought to argue otherwise; but whether it is relevant testimony within the meaning of the section depends upon whether it is testimony that is relevant to an issue in the matter and not whether it is testimony—if, as I say, "testimony" can be used in this sense at all—which is merely material which might lead to a line of inquiry which would in fact disclose the testimony. The judge, I think, was distinguishing perhaps between oral material and written material; but the difficulties to which such a distinction lead are manifest when one considers the order that has been made and the way in which Sir Frank Soskice has sought to justify it. Let me take as an example the agreement of 1902 which we heard discussed in the course of the case. The judge, having refused to order that the company, through its proper officer, should disclose that document, the order that he has made is one which empowers the applicants to put one of the directors of the company in the box and to give him notice to produce the document which the company has not been ordered to produce. In other words, instead of producing it through its proper officer, it is to be required to produce it through a director. Of course, the company can pass a resolution quite properly—and Sir Frank Soskice does not argue otherwise—saying that its director, Sir George Nelson, is not to have any authority to produce the document. The company itself has been told that it need not produce it by its proper officer and it can deprive Sir George Nelson of any power or authority to produce it. What could Sir Frank in that event do? The answer is that he would ask Sir George Nelson questions about the document. In other words, the effect of the order is that although the company may not be ordered to produce the document itself its servants may be compelled to go into the witness-box and answer questions about it. The primary evidence not being allowed, secondary evidence would be brought in instead. That cannot, in my judgment, be the right distinction. There is in fact no distinction as far as principle is concerned between the two Parts of the request, A and B, and the judge, I think with respect, ought to have applied the same principle to both.

The consequence, in my judgment, is that the appeal ought to be allowed and the order of Master Burnand restored.

Lord Goddard C.J. I agree. I would only add that I base my judgment upon two short points. First, whichever way one looks at this case it seems to me that it is in effect an application that the English companies should give discovery of their documents. It is agreed now that the order could not be made upon the companies because they are not parties to the action, and the device, if I may use that expression without offence to anybody, of saying that a director is to be called and may be examined with regard to these documents seems to me only to be trying in another way to get discovery which cannot be ordered under the Act. Secondly, it seems to me perfectly clear from the passage in the judgment of Judge Igoe to which Devlin J. has referred, that this is merely an attempt to get evidence in the course of discovery proceedings which are known to the American courts—and are also known to the Canadian courts—which are a sort of pre-trial before the main trial. It is an endeavour to get in evidence by examining people who may be able to put the parties in the way of getting evidence. That is mainly what we should call a "fishing" proceeding which is never allowed in the English courts, and I think that that of itself would be a complete objection and ought to justify this court in refusing to make the order. For the rest, I have nothing to add to the judgment which my brother has given.

Hilbery J. I agree with both judgments which have been given.

*Appeal allowed.*
*Leave to appeal.*

Solicitors: *Linklaters & Paines; Theodore Goddard & Co.*

J. F. L.

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1956
*Jan.* 18, 19.

Lord Goddard C.J., Stable and Ashworth JJ.

## REYNOLDS *v.* JOHN.
## T. WALL & SONS LTD. *v.* JOHN.

*Advertising—Prohibition—Loudspeaker—Prohibition against operating loudspeaker for the purpose of advertising in street—Ice-cream consumer sales van equipped with mechanism for producing chimes —Chimes sounded to indicate presence of van—Whether "for the "purpose of advertising"—"Loudspeaker"—Glamorgan County Council Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c. li*), *s.* 115 (1) (5).

*Statute—Construction—Definition section—"Include"—Prima facie word of enlargement—Glamorgan County Council Act*, 1952, *s.* 115 (5). *Ejusdem Generis Rule — Statute — Offence — "Amplifier or "similar instrument" — Glamorgan County Council Act,* 1952, *s.* 115 (5).

The appellant company operated, for the purpose of selling ice-cream, a number of consumer sales vans, which were equipped with an electrically operated mechanism for producing a sound of chimes. The appellant company, having advertised their ice-cream in Penarth, notified potential customers that the method of informing them of the van's presence was by the sounding of the chimes. The driver, R., and his employers, the appellant company, were convicted of operating and causing to be operated, respectively, a loudspeaker in a street of Penarth "for the purpose of adver-"tising" the business of an ice-cream vendor contrary to section 115 (1) of the Glamorgan County Council Act, 1952:—

*Held*, that the words "for the purpose of advertising" in section 115 (1) were not limited to denoting some form of commendation, but included persons calling attention to themselves or their wares by means of a loudspeaker; that a "loudspeaker" within the section was an apparatus electrically driven to reproduce sound over a wide area; that in the present case the mechanism in question was a loudspeaker, operated for the purpose of advertising and the company and R. were guilty of the offence.

*Per* Goddard C.J. *Quaere* whether an instrument need be electrically operated to be within the section.

CASES STATED by Glamorgan justices.

The prosecutor, Richard John, laid informations against the defendants, Gordon Reynolds and his employers, T. Wall & Sons Ltd., charging that they on February 6, 1955, at Penarth in a certain street, did operate and did cause to be operated, respectively, a loudspeaker for the purpose of advertising the business of an ice-cream vendor contrary to section 115 (1) of the Glamorgan County Council Act, 1952.[1]

The justices found the following facts. On February 6, 1955, Gordon Reynolds was employed by T. Wall & Sons Ltd. as a van driver and salesman in charge of a consumer sales van. The van was one of a number of similar vans each equipped with a mechanism for producing a sound of chimes. The vans were operated by the company throughout England and Wales for the purpose of selling ice-cream direct from the van to consumers in the street outside their homes. The company had been operating such vans in Glamorgan for about five years and had employed Reynolds for nearly two years. In the course of his employment Reynolds had regularly visited Penarth with his van at regular times in the course of each week for the purpose of selling ice-cream. Before starting to operate a consumer sales van in the area of Penarth the company, in accordance with their usual practice, advertised their ice-cream in the area on cinema screens, on hoardings and in the local press, thereafter canvassed individual residents in the area and from the result of the canvass worked out the round to be followed by the vans. The company then sent out circulars advertising their ice-cream to residents in the area and compiled a list of potential customers in the area. The company then notified customers that the van would be in the area at certain approximate times and that the method of informing them that the vans were there was the sounding of the chimes. On the dashboard of Reynolds' van was printed the following notice to the driver:—"Don't sound "the chimes (1) When the van is stopped; (2) Near hospitals; "(3) More than once in five minutes." On February 6, Reynolds was driving the van along Redlands Avenue, a street at Penarth. While so driving the van he operated the mechanism which produced a sound of chimes. As a result of hearing the chimes sounded, various persons came up to the van and Reynolds sold to them ice-cream from the van. The chimes were produced by Reynolds pressing a button on a box beside the driver's seat from which wires ran to another box beneath the vehicle from which the sound of the chimes came; the mechanism could only be operated when the ignition switch of the van was switched on. The evidence relevant to that point was that Police Constable Clifford Dolan stated that on February 6, 1955, he clearly heard the chimes when nearly half a mile away and that he came to the van and examined it while it was standing in Redlands Avenue and heard the chimes demonstrated by Reynolds. The defendants called no evidence as to how the sound was produced.

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[1] Glamorgan County Council Act, 1952, s. 115: "(1) No person shall for "the purpose of advertising any trade "or business or any part of a "trade or business operate or cause "or suffer to be operated any loud-"speaker when such loudspeaker is in "any street in the county. . . . "(5) In this section the expression "'loudspeaker' includes an amplifier "or similar instrument."

It was contended by the defendants that there was not sufficient evidence before the justices to draw the inference that the mechanism was amplifying sound or that it was capable of amplifying the human voice. Even if there were sufficient evidence before the justices to enable them to draw the inference that the mechanism was amplifying sound, it was not a "loud-"speaker" within the meaning of section 115 in that to fall within that definition the mechanism had to be capable of amplifying the human voice. The chimes were not used for the purpose of advertising any trade or business or any part of any trade or business within the meaning of section 115 (1).

It was contended by the prosecutor that the mechanism was a loudspeaker and that the chimes were sounded for the purpose of advertising a trade or business or part of a trade or business within the meaning of section 115.

The justices were of the opinion that the mechanism was a loudspeaker within the meaning of section 115 and that the word "loudspeaker" in the Act was not limited to mechanism that produced only the human voice. There was sufficient evidence for the justices to infer that the mechanism amplified sound. The chimes were used for the purpose of advertising the trade or business of the company because they were sounded to announce the arrival of the van with ice-cream to sell and thereafter persons came to Reynolds' van to buy ice-cream as a result of hearing the chimes. The justices accordingly found the defendants Guilty and imposed a fine of £1 on Reynolds and £2 on the company.

The defendants appealed.

The questions for the opinion of the High Court were whether there was sufficient evidence on which the justices could find that the mechanism was a "loudspeaker" and whether they were right in law in holding that the chimes were used for the purpose of advertising within the meaning of the Act.

*F. W. Beney Q.C.* and *T. H. Tilling* for the defendants. The questions raised by these appeals depend on the construction of section 115 of the Glamorgan County Council Act, 1952; they are (1) whether the section applies to an apparatus which gives out the chimes of a clock, and, if it does, (2) whether these chimes were used "for the purpose of advertising any trade or business." The sounding of chimes was not part of the defendants' advertising campaign, which had been completed before the defendants' vans went on their rounds. It was merely signifying that the shop was open.

[LORD GODDARD C.J. "Advertise" means make plain, does it not?]

Advertising is a matter of commendation. In this case the sound of chimes is only an invitation to do business and does not include anything in the nature of commendation. The section is a penal section and therefore should be strictly construed. There is no evidence that the apparatus used was an amplifier. An amplifier magnifies sound or speech, and there was no evidence that the sound of the chimes had been magnified.

[LORD GODDARD C.J. By subsection (5) loudspeaker includes amplifier; but does not an amplifier have to bear some relation to a loudspeaker? "Loudspeaker" sounds as if it should have some connexion with the human voice.]

A loudspeaker must mean speaking out. The whole nature of the section appears to be concerned with speech.

[ASHWORTH J. Why should they want to define loudspeaker if it has its ordinary meaning?]

The reason may be that an amplifier might not be included.

[LORD GODDARD C.J. Subsection (5) is not really a definition section. If loudspeaker stood alone I would have no difficulty in saying that the sound had to be spoken.]

Those who drafted the section could, had they so wished, have included something to deal with sounds other than vocal sounds.

[ASHWORTH J. The object of the section is clearly to stop advertising in the street.]

On the evidence the sound of the chimes was not for the purpose of advertising.

[LORD GODDARD C.J. The Shorter Oxford English Dictionary states that "advertise" means, inter alia, "to call the attention "of; to notify . . . ; to give notice of, make generally known; to "make publicly known . . . to give warning or information." It seems that the very object of the chimes was to give notice and warning to the public that the defendants' ice-cream van was there.]

*G. R. Rougier* for the prosecutor. The evil and mischief at which this section was aimed should be considered. The whole object is to prevent a nuisance by loud noise. A certain amount of noise must be suffered, even in residential areas, and therefore the section would not apply to the ordinary hawker or muffin man, but the instruments on the defendants' vans make a much greater noise. The genus described in subsection (5) is, first, an instrument capable of making a loud noise, and, secondly, an electrical instrument. The Concise Oxford Dictionary defines "loudspeaker" as "apparatus that converts electrical impulses "into sounds loud enough to be heard at some distance," and "amplifier" as "appliance increasing loudness of sounds, "strength of wireless signals, etc." Speaker is just incidental to the word "loudspeaker." It is an apparatus which is last in the chain in wireless where electrical impulses are turned into sound. If that is so, one need not concern oneself with the rest of the genus because it is not necessary to show that there has been any amplification.

There was evidence here to show that the apparatus came within the section because it was clearly an electrical apparatus which produced sound, and was operated in the street for the purpose of advertising.

*Tilling* in reply. Advertising means either (1) merely making known one's presence, or (2) puffing or extolling. Nowadays it generally has the second meaning, and in its context in the section should be so read.

ASHWORTH J., delivering the first judgment: These two appeals, which have been heard together, raise as the crucial issue the proper construction of section 115 of the Glamorgan County Council Act, 1952. [His Lordship referred to the facts and to the evidence of Police Constable Dolan and continued:] In the absence of any other evidence, it seems to me that the inference was irresistible that the method of producing the sound of chimes was by means of some electrical apparatus. [His Lordship read subsections (1) and (5) of section 115 and continued:]

The justices came to the conclusion that the offences charged were proved and, in support of the appeals, Mr. Beney has contended, first, that it was not right for the justices to hold that this van and the apparatus on it was operated for the purpose of advertising, secondly, that in any event this apparatus was not a loudspeaker within the meaning of that word simpliciter or within the meaning of the definition. It is true that before February 6 there had been a campaign which one may fairly call an advertising campaign conducted by the appellant company but, in my judgment, the words " for the purpose of advertising " are not limited in the way suggested by the appellants, namely, denoting some form of commendation or puff. In my view, the object of subsection (1) is perfectly clear, it was to prevent advertising in a street, and that would include the prevention of persons calling attention to themselves or to their presence there or to the wares which they were about to sell by means of a loudspeaker; and that is precisely what the appellant Reynolds was doing and what, indeed, had been previously announced he would do. He was informing the residents, in accordance with the programme of which they had been informed, that he was there, and that he was there to do business. I think it is almost unarguable to suggest that he was not at that moment operating his apparatus for the purpose of advertising his trade or business.

The other point is, however, more troublesome. Before considering what the definition means, it is perhaps worth citing a passage from the well-known decision in *Dilworth* v. *Commissioner of Stamps* [1] dealing with definitions which incorporate the word " include ". In the judgment of the Privy Council this passage occurs [2]: " Section 2 is, beyond all question, an interpreta-" tion clause, and must have been intended by the legislature to " be taken into account in construing the expression ' charitable " ' devise or bequest ', as it occurs in section 3. It is not said in " terms that ' charitable bequest ' shall mean one or other of " the things which are enumerated, but that it shall ' include ' " them. The word ' include ' is very generally used in inter-" pretation clauses in order to enlarge the meaning of words or " phrases occurring in the body of the statute; and when it is " so used these words or phrases must be construed as compre-" hending, not only such things as they signify according to " their natural import, but also those things which the interpreta-" tion clause declares that they shall include. But the word " ' include ' is susceptible of another construction, which may " become imperative, if the context of the Act is sufficient to

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[1] [1899] A.C. 99; 15 T.L.R. 61.

[2] [1899] A.C. 99, 105.

"show that it was not merely employed for the purpose of adding "to the natural significance of the words or expressions defined. "It may be equivalent to 'mean and include', and in that case "it may afford an exhaustive explanation of the meaning which, "for the purposes of the Act, must invariably be attached to these "words or expressions."

In the present case the definition of "loudspeaker" is in the following terms: "'loudspeaker' includes an amplifier or similar "instrument". In my view, it is the first of the two alternatives which I have just cited which should be applied in this case, and the word "include" in subsection (5) was, in my view, inserted for the purpose of enlarging rather than restricting the meaning which might arise from the simple use of the word "loudspeaker". I am fortified in that conclusion by the fact that the subsection includes the words "or similar instrument".

That brings me to the question: What is a loudspeaker? A loudspeaker is, in my view, an apparatus which is electrically driven for the purpose of reproducing sound over a wide area. It was suggested at one time in the course of the case that "loudspeaker" is by inference limited to an apparatus which reproduces speech, but I have no doubt that that limited construction is wrong. One has only to use one's common sense to remember that at stations in London and elsewhere what are admittedly loudspeakers are used for the purpose of informing passengers of the platforms from which trains will depart, and if the apparatus is not so used it is a common practice to use it for the broadcasting of music. In my view a loudspeaker does not cease to be a loudspeaker because it is used for the reproduction of music.

Applying the definition which I have suggested to the facts of this case, it is, I think, abundantly clear that this apparatus was electrically driven and that the result of its being operated was the reproduction and distribution of sound over a wide area. I should be content to uphold the decision of the justices on the ground that there was ample evidence before them which would justify the finding that the hearing of chimes at a distance of half a mile constituted this instrument a loudspeaker.

I am not concerned with the possibility that it might be an amplifier, but I think that it would also be open to uphold this particular decision on the ground that this apparatus was a similar instrument. Mr. Rougier, for the respondent, submitted that the genus involved in subsection (5) is an instrument electrically driven making a loud noise. For my part, I am prepared to accept that as a description of the genus. One also has in mind the object, as one conceives it to be, of this particular section, which was to put a stop to noisy advertisements in streets, for which purpose by-laws had previously proved ineffective; and with that in mind, it seems to me that an instrument electrically operated, as this was, which reproduced chimes audible at a distance of half a mile, could clearly be held by the justices to be a similar instrument to a loudspeaker. On either of those grounds, therefore, for my part I would dismiss these appeals.

STABLE J. I agree. In my judgment, there was evidence before the justices which justified them in finding that the apparatus in question was a loudspeaker, "loudspeaker" being a word which includes an amplifier or similar instrument. The justices found that this apparatus did come within that definition. I think that the question was one of fact and that there was evidence before them which entitled them so to find. I agree that the appeals should be dismissed.

LORD GODDARD C.J. I agree with the judgments which have been delivered. I only want to add one word, and that is that although it is not necessary to decide it in this case, I should prefer to reserve my opinion as to whether, to bring an instrument within the definition clause in this case, it is necessary that it should be electrically operated, because I think that the word "amplifier" would possibly be enough to include a megaphone or foghorn. If they were used in the street I do not feel by any means certain that an offence would not be committed. I only want to say that I reserve my opinion as to whether or not it would be necessary, before saying that the instrument was prohibited by this subsection, to find that it was electrically operated. Otherwise, I agree with the judgments pronounced.

*Appeals dismissed.*

Solicitors: *Simpson, North Harley & Co.; Torr & Co. for Richard John, Cardiff.*

C. J. E.

C. A.

1955
*Nov.* 28,
29, 30.

Singleton, Jenkins and Parker L.JJ.

## VINE *v.* NATIONAL DOCK LABOUR BOARD.

[1953 V. No. 287.]

*Tribunal—Statutory—Control by courts—Declaration—Labour board—Delegation of disciplinary powers by national board to local board—Unauthorized delegation of disciplinary powers by local board to committee of local board—Wrongful dismissal—Whether damages sufficient remedy—Whether declaration should be granted—Dock Workers (Regulation of Employment) Order,* 1947 (*S.R. & O.* 1947, *No.* 1189).

*Dock — Dock workers — Labour board. Contract — Repudiation—Acceptance — Statement of claim, in — Subsequently amended—Whether plaintiff may treat contract as still subsisting.*

The plaintiff was a dock labourer employed in the reserve pool by the defendants, the National Dock Labour Board, under the scheme set up by the Dock Workers (Regulation of Employment) Order, 1947. On October 29, 1952, the plaintiff was allocated work with a company of stevedores but failed to report to them, and the company lodged a complaint with the National Dock Labour Board. On November 13, 1952, the complaint was heard by a disciplinary committee appointed by the local dock labour board, who found the complaint true and, purporting to act under clause 16 (2) (*c*) of the Order of 1947, gave the plaintiff seven days' notice to terminate his employment with the National Dock Labour Board. The plaintiff's appeal to an appeal tribunal set up under the scheme was dismissed. He started proceedings against the defendants in the county court, claiming damages for wrongful dismissal, and the case was thereafter transferred to the High Court. By his statement of claim (which contained a statement, later amended, that he had ceased to be employed by the defendants) the plaintiff sought both damages and a declaration that his purported dismissal was illegal, ultra vires and invalid. Ormerod J. awarded the plaintiff £250 damages and a declaration that the action of the board was ultra vires or invalid:—

*Held*, (1) that the local dock labour board had no power under the scheme to delegate its disciplinary powers given by clause 16 of the Order of 1947 to a disciplinary committee of the board and that the purported dismissal was therefore invalid.

*Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113 applied.

(2) (Jenkins L.J. dissenting) that in the circumstances of the present case a declaration should not be granted and the sum of £250 was sufficient remedy to the plaintiff as damages for all time.

*Per* Singleton L.J. The plaintiff ought to have been put to his election at the trial whether or not to accept the defendants' repudiation of his contract of employment and treat it as discharged.

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[Reported by G. D. Black, Esq., Barrister-at-Law.]

*Per* Parker L.J. He had already made a final election by his statement of claim in its original form to treat the contract as discharged, and the case fell to be treated only as one for damages for wrongful dismissal.

Judgment of Ormerod J. varied.

APPEAL from Ormerod J.

The plaintiff was employed at Southampton by the National Dock Labour Board as a registered dock worker within the provisions of the Dock Workers (Regulation of Employment) Order, 1947.[1] He was employed in the reserve pool and on October 29, 1952, was told to report to a firm of stevedores, J. Rose & Co. Ltd., for work. The plaintiff failed to report to the company. The company, in accordance with clause 15 (3) of the Order, reported him to the manager of the National Dock Labour Board at Southampton who, in turn, wrote to the plaintiff, informed him of the complaint, and asked for his explanation. The plaintiff replied that he had asked the port officer for work which would enable him to leave at five o'clock in the afternoon but that his request had been refused. The manager thereupon notified the plaintiff that a disciplinary committee would be considering his case and asked him to attend. The disciplinary committee, which consisted of one employers' and one workers' representative, was appointed by the local dock labour board. The committee considered the case and, purporting to act under clause 16 (2) (*c*) of the Order, gave the plaintiff seven days' notice of termination of his employment. The plaintiff appealed in accordance with the provisions of clause 18 (1) to an appeal tribunal, who dismissed the appeal. In February, 1953, the plaintiff started proceedings in Southampton county court claiming £136 damages and £3 costs. The defendants applied for and obtained an order transferring the action to the High Court. On January 12, 1954, the plaintiff delivered a statement of claim asking for both damages and a declaration that his purported dismissal was illegal, ultra vires and invalid. On July 28, 1955, at Winchester Assizes Ormerod J. held that the plaintiff had proved his case, gave him judgment for £250 and granted a declaration that the action of the board was ultra vires or was invalid by reason of the fact that there had not been compliance with the provisions of the scheme regulating the dismissal of workers in the reserve pool.

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[1] Dock Workers (Regulation of Employment) Order, 1947:

Clause 15 (3): "A registered dock "worker available for work who "while in employment to which "he has been allocated by the "local board fails without adequate "cause to comply with the provisions "of clause 8 (5) hereof, or fails to "comply with any lawful orders "given to him by his employer, may ". . . be reported in writing to the "local board. . . ."

Clause 16 (2): "Where a registered dock worker available for "work fails to comply with any of "the provisions of the Scheme, then "without prejudice to and in addition to the powers conferred by "clause 15 hereof, the local board "may take any of the following steps "as regards that dock worker—it "may (*a*) determine that for such "period as it thinks proper he shall "not be entitled to any payment "under clause 14 hereof; (*b*) suspend "him without pay for a period not "exceeding seven days; (*c*) give him "seven days' notice of termination "of employment; (*d*) dismiss him "summarily."

Clause 18 (1): "If a registered "dock worker who is available for "work is aggrieved because—. . . "(*e*) he has received seven days' "notice to terminate his employment "in accordance with paragraphs (1) "(*b*) and (3) of clause 17; he may ". . . within three clear days of "notice given to him of such . . . "termination, lodge an appeal in "writing with the appeal tribunal; ". . ."

The defendants appealed against this decision and contended that neither a declaration nor damages should have been awarded and, further, that in any event the damages were too high.

*Harold J. Brown Q.C.* and *G. W. Willett* for the defendants. The plaintiff, a registered dock worker in the reserve pool, complained that he was dismissed by a disciplinary committee of the local dock labour board purporting to act under clause 16 (2) (*c*) of the Order of 1947, and not, as required by the scheme, by the local board itself. The plaintiff was in fact dismissed under clause 17. Clause 16 (2) (*c*) and 16 (2) (*d*) apply only to men in allocated employment and not to those in the reserve pool; if a man is dismissed under these clauses he returns to the reserve pool.

[SINGLETON L.J. Does not clause 16 (2) (*a*) deal with men in the reserve pool?]

Yes, because the question of a guaranteed wage does not arise in the case of men in allocated employment. Clause 17 deals specifically with men in the reserve pool and makes no mention of the local board. The plaintiff received seven days' notice in writing under 17 (1) (*b*). Further, he appealed under clause 18 against his dismissal from the scheme, and clause 18 does not apply to a dismissal under 16 (2) (*c*) or 16 (2) (*d*) but only to a dismissal from the reserve pool.

The plaintiff is attempting to bring his dismissal under clause 16 so that *Barnard* v. *National Dock Labour Board* [2] will apply. In *Barnard's* case,[2] however, the port manager alone made the decision of dismissal. Here the disciplinary committee, properly

[2] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

constituted with a quorum of two as envisaged by Denning L.J. in *Barnard's* case,[3] acted under clause 17. The port manager in the present case did not purport to terminate the plaintiff's employment but merely sent the notice on behalf of the disciplinary committee or of the local board. The removal of a registered worker's name from the register under 17 (3) is an administrative act and can be delegated to anyone.

If the plaintiff was wrongfully dismissed, damages are a sufficient remedy and a declaration should not have been granted. Ormerod J. apparently did not appreciate that in *Barnard's* case[4] there was no money claim. In an ordinary case of wrongful dismissal from employment no declaration is granted. There must be some finality to litigation.

[PARKER L.J. The difficulty here is that the plaintiff was never put to his election and asked whether he wanted either a declaration or damages for loss of wages.]

That is so. The quantum of damages is too high. It should have been based on the plaintiff's standing as a weekly unskilled worker.

*Phineas Quass Q.C.* and *T. O. Kellock* for the plaintiff. The disciplinary committee was set up allegedly to implement clauses 15, 16 and 17, and this was approved by the National Dock Labour Board. This indicates that it was thought that all three sections were disciplinary sections. Even if under clause 3 (3) the National Dock Labour Board could have delegated questions of discharging registered dock workers to the local dock labour board they have never in fact done so. Therefore questions of discharge remain with the National Dock Labour Board. The National Dock Labour Board could at some time in future declare the plaintiff redundant, but this court should not speculate about what might happen.

Clauses 16 and 17 overlap, and it is sufficient for the plaintiff's case to submit that clause 16 applies to both reserve pool workers and men in allocated employment. The plaintiff did not arrive at his allocated work and so remained in the reserve pool. He appealed against the decision made under clause 16 (2) (*c*) and there is nothing in the provisions of the scheme which limits the right of appeal under clause 18 to dismissal under clause 17. The defendants purported to act under clause 16 (2) (*c*) and *Barnard's* case[4] makes it clear that such purported action was void.

This is not an ordinary case of master and servant; there is a question of status involved. A man cannot work as a dock labourer at all unless his name is on the register (see clauses 9 (2) and 10 (1)), and it is an offence for an employer to give work to such a man. As a result of the defendants' action the plaintiff is deprived of the opportunity of obtaining his livelihood in his chosen occupation. In *Barnard's* case[4] the plaintiffs were suspended for only seven days, yet a declaration was granted. This case is more analogous to expulsion from a club or trade union than to a master and servant case. Declarations are now more readily granted than hitherto, and Ormerod J. exercised his discretion correctly.

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[3] [1953] 2 Q.B. 18, 40.

[4] [1953] 2 Q.B. 18.

The damages awarded were for loss of wages to the date of the judgment and not once and for all; the declaration covered that. The plaintiff did not accept his dismissal in the sense that he voluntarily acquiesced in it. He sought other employment because he had no choice in the matter. A declaration is necessary to enable him to return to his work at the docks.

*Brown Q.C.* in reply. Declarations should be granted sparingly: *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.*[5] The plaintiff did not seek a declaration in his county court summons, and in his original statement of claim it was pleaded that he had ceased to be employed by the defendants.

[SINGLETON L.J. In an ordinary master and servant case one cannot plead both employment and non-employment.]

[JENKINS L.J. But if his name has not been validly removed from the register, then in law it must still remain there.]

To grant a declaration would be to try to enforce a contract for personal services, which courts in the past have been reluctant to do.

[JENKINS L.J. This is not an ordinary case of contractual rights between a master and a servant.]

The damages should be one week's wages plus some further amount for the likelihood or otherwise of his having permanent employment in the docks. In this case the plaintiff's chances would not be high in view of his previous bad record.

SINGLETON L.J. This is an appeal from a judgment of Ormerod J. given at Winchester Assizes on July 28, 1955. The case arose under the Dock Workers (Regulation of Employment) Order, 1947. The Order was made under the powers given by the Dock Workers (Regulation of Employment) Act, 1946, an Act which was to make further provision for the regulation of

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[4] [1953] 2 Q.B. 18.

[5] [1921] 2 A.C. 438, 445.

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the employment of dock workers. The Order established the scheme (which is contained in the Schedule), the objects of which were to ensure greater regularity of employment and an adequate number of dock labourers available for dock work.

The scheme is involved, and there has been over a period of years a good deal of discussion on, and criticism of, its form. It ought to be recognized that there were very great difficulties in the way of the draftsman and of those who were associated with him. The scheme shows an attempt to meet the desires of two or possibly three different bodies. All of us know that years ago there were troubles in every dock area arising from one cause or another. There was at most centres a queue of people waiting for work which, when it arose, was often only work for a day, or work on a particular ship. Many of those who were waiting did not get employment. There was dissatisfaction. At other times it might be that there was a shortage of dock labourers, stevedores, and the like, by reason of the fact that they had ceased to wait for work, having been so often disappointed. Thus it came about that an effort was made under which employers and workers were encouraged to get together with government help and advice, through the Ministry of Labour, and the Act of Parliament was passed, and the scheme followed.

I do not think it is necessary for the court, upon the hearing of this appeal, to go into all the clauses of the scheme. Probably the less we say about them the better, for I understand that there may be other regulations taking their place by and by. It is very easy to criticise the scheme.

The plaintiff was a dock labourer and he was in the reserve pool. There are certain dock labourers who have regular contracts of employment, or arrangements for employment, with the same employers. There are others who under the scheme are in the reserve pool. There may be a question as to who are the employers from day to day of those who are in the reserve pool. Clause 8 (2) of the scheme reads: "A registered dock "worker in the reserve pool who is available for work shall be "in the employment of the National Board." A man who is in the reserve pool is paid by the National Board. The National Board, through the local board, draws money earned by those men from time to time from the people who employ them and to whom they have been allocated, and the local board, for the National Board, pays those who are in the reserve pool. The benefit of the reserve pool is that it provides a kind of minimum wage and regular payment for those who are in the reserve pool.

They, in order to comply with their part under the regulations, have to carry out the duties put upon them by the scheme. Clause 8 (1) provides that " Every registered dock worker shall " be deemed to have accepted the obligations of the scheme." By clause 8 (4): " A registered dock worker available for work " in the employment of the National Board shall carry out " the directions of the local board . . ." When one who is in the reserve pool is allocated to a particular employer at a particular time, it is his duty to go to the employer to whom he is allocated and to do the work which is required.

The plaintiff was told to work on October 29, 1952, for a company of stevedores, J. Rose & Co. Ltd. He did not report for work, so the stevedoring company reported him to the manager of the National Dock Labour Board, Southampton, by letter of October 30, which is in these terms: " We have to " inform you that [the plaintiff] was allocated to this company " at 8 p.m. yesterday for work on the 'Georgic' at 46 Berth, " but failed to arrive on the job and the work had to be performed " by eight men only."

The National Dock Labour Board passed on the complaint to the plaintiff on the same day. They wrote as follows: " The " following complaint regarding your failure to observe the conditions of the dock labour scheme has been made, that at the " 12.45 p.m. call on October 29, 1952, you were allocated for " work on the S.S. 'Georgic' at 46 Berth commencing at " 8 p.m. that night but failed to report, by J. Rose & Co., Ltd., " and the National Dock Labour Board. Will you please write " your explanation on the back of this form and return it to this " office within three days; after which time disciplinary action " may be taken without awaiting your reply. You are advised " to consult your trade union officer. A copy of this form is " attached for you to keep."

I draw attention to the fact that the complaint which was made might be followed by disciplinary action in certain events. It was disciplinary action which was in the mind of the officer of the National Dock Labour Board who sent the notice.

The plaintiff's explanation was in these words: " Had " requested to port officer to be given work so that I could finish " at 5 o'clock and was refused "—not the most tactful of explanations, perhaps, but still that was the explanation given. It was followed by a notice from the manager of the National Dock Labour Board to the plaintiff that " a disciplinary com" mittee will be considering this case at 3 p.m. on Thursday,

" November 13, 1952, at this office. Please arrange to be in " attendance."

Two members of the disciplinary committee of the board were appointed to sit upon the disciplinary committee (I shall refer to that in a moment), and they sat upon the case on November 13. It is desirable to make clear that following the practice of the board the two members of the disciplinary committee who were present were one representing the employers and one representing the workers. I do not propose to read the record, but towards the end of it the following words appear: " At the conclusion of the hearing, in reply to a question from " the chairman, [the plaintiff] stated that he was quite satisfied " that he had been given a fair hearing and had no complaint in " this respect." Then the conclusion is stated: " The com- " mittee carefully considered all the facts of the case, together " with [the plaintiff's] previous record, and in view of all the " circumstances it was agreed that he should be given seven " days' notice to terminate his employment with the board on " the following grounds: failure to report for work at 8 p.m. on " October 29, 1952, after being allocated at the 12.45 p.m. call " on that day, in addition to failure from time to time to comply " with terms of local agreements." From that finding there was an appeal by the plaintiff to an appeal tribunal set up under the scheme, and that tribunal dismissed the appeal.

The result was that the plaintiff, having been given seven days' notice, left the employment of the National Dock Labour Board about the end of November, 1952. In February, 1953, he started proceedings in the county court at Southampton and his claim was stated in this way: " The plaintiff claims damages, " wages, £136, costs £3," a total of £139. The defendants objected to the jurisdiction, and an order was made in the county court that the case be transferred to the High Court in view of the defendants' objection. Ultimately a statement of claim in the action was delivered on January 12, 1954, when the plaintiff's claim was enlarged so that he claimed " (1), a declaration that " his purported dismissal was illegal, ultra vires and invalid; " (2), Damages."

His claim was heard by Ormerod J. at Winchester on July 15 and 16, 1955. On July 28 the judge gave a considered judgment in which he held that the plaintiff had proved his case: he gave judgment for him for a sum of £250 damages, and he also granted a declaration that the action of the board was ultra vires or was invalid by reason of the fact that there had not been compliance with the scheme.

From that judgment the defendants appeal to this court and they raise three points. First, it is said that the judgment was wrong in that judgment ought to have been entered for the defendants. Secondly, it is submitted that if the judgment of Ormerod J. was right he ought not to have granted a declaration in the circumstances of this case. And thirdly, it is said that, in any event, the damages were too high.

First, a word must be said about the regulations which are contained within the scheme. They were the subject-matter of consideration in this court in 1953 in *Barnard* v. *National Dock Labour Board.*[1] The court in that case held that the local board had no power, express or implied, to delegate its quasi-judicial disciplinary functions to the port manager or to ratify his purported exercise of those functions, and the original notice of suspension was, therefore, a nullity and the decision of the appeal tribunal based on them were equally a nullity.

It is claimed on behalf of the plaintiff that the decision of the disciplinary committee was void and of no effect by reason of the fact that the local board had no power to delegate its powers to a disciplinary committee. It is common ground in this case that certain powers given to the local board were delegated to the two members of the disciplinary committee who sat upon the plaintiff's case. The clauses of the scheme which are important for this purpose appear to me to be clauses 15, 16, 17 and 18.

It is right to say that when the National Board took disciplinary action against the plaintiff they purported to be acting under clause 16 (2) of the regulations. [His Lordship read clause 16 (2) and continued:] The powers are given to the local board, and as this court said in the case of *Barnard,*[1] those powers are either of a judicial or of a quasi-judicial character, and the local board to whom they are given cannot delegate their powers. In the case I have mentioned the delegation was to the port manager. In the present case the delegation was to two members of a disciplinary committee. It was pointed out to the trial judge that there was no power to delegate those powers to the disciplinary committee; it was the duty of the local board to exercise them itself. Ormerod J. followed the decision of this court in *Barnard's* case,[1] and held that that delegation was wrong and that, there having been no decision of the local board, the whole proceeding was null and void; he held further that, though there was an appeal to the appeal committee, the effect of the appeal could not make anything out of that which was nothing. Thus he decided in favour of the plaintiff.

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[1] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

It appears to me that that is right upon the decision of this court in *Barnard's* case.[1] It would be of great convenience if the local board, who have many duties, were able to delegate certain questions to some of their members, but by doing that which they did in this case they excluded from sitting those members who were not nominated to sit. The minutes show that on October 2, 1947, a disciplinary committee was set up. The minute records: "In order to implement clauses 15, 16 and 17 "of the scheme it was decided to appoint a disciplinary com-"mittee at each port consisting of one member representing the "dock workers and one member representing the employers. At "Southampton these duties would be undertaken by the local "members in turn and the cases at Poole would be dealt with "by Messrs. Gapper and Way, and at Weymouth by Messrs. "Salmon and Vine." That practice was followed; it was approved by the National Board. I am inclined to think that it would have been a very helpful thing if the scheme had allowed it. But the scheme does not provide for it. The scheme provides for the National Board delegating a good many of its duties to the local boards, but there is no provision for a delegation by the local board of a matter such as this: the local board is not given power to delegate. If there is a disciplinary proceeding under clause 16 it must be according to the terms of the scheme, and if, by reason of delegation such as that which was the practice, other members are excluded from sitting upon the local board there is no decision of the local board.

It follows from what I have said that the appeal against the judgment in favour of the plaintiff fails. I ought to add that it was said by Mr. Harold Brown, on behalf of the defendants, that clause 17 of the scheme came into play. Clause 17 is concerned with a registered dock worker in the reserve pool, whereas, so far as the wording of clause 16 goes, that is not limited to a reserve pool man, nor does it exclude, on the face of it, a reserve pool man. Clause 17 reads: "(1) The employ-"ment of a registered dock worker in the reserve pool who is "available for work shall not be terminated except—(*a*) by "summary dismissal in the case of serious misconduct; or

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[1] [1953] 2 Q.B. 18.

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"(b) by the giving of seven days' notice in writing; or (c) so as "to enable the worker to be employed in accordance with the "provisions of the scheme. (2) A registered dock worker in the "reserve pool who is available for work shall not leave his "employment with the National Board except by giving seven "days' notice in writing to the local board or so as to be "employed in accordance with the provisions of the scheme. "(3) Where the employment of a registered dock worker by the "National Board has been terminated under paragraph 1 (a) "or (b), or under paragraph 2 hereof after notice given by him, "his name shall forthwith be removed from the register or "record." Under clause 18 of the scheme there are rights of appeal in respect of action taken under most parts of clause 16 and clause 17.

Mr. Harold Brown said that the engagement of the plaintiff was terminated by seven days' notice in writing. That could be given under clause 17; therefore there is no need to call in clause 16; and as the plaintiff's engagement was terminated by the giving of seven days' notice in writing, he had a right of appeal which he exercised. Said Mr. Brown: why not treat it as something done under clause 17 against which there was an appeal, and regard it as properly done? The answer to that appears to me to be a simple one. Action was not taken under clause 17 but was taken under the clause which is the clause with the marginal note "Disciplinary procedure." If a body such as this takes action, as it did, on a matter of discipline and sets up a tribunal to regulate the question of discipline, the body cannot afterwards claim that it did not act under clause 16, but gave seven days' notice under clause 17. That will not do. They purported to act in a disciplinary matter. Their procedure was wrong, and the judge was right so to hold. They cannot say thereafter: "We might have given notice under clause 17 "and it is the same thing." It is not the same thing. The employers, whom I take for this purpose to be the National Board, might have acted under clause 17 in certain circumstances; but they did not do so in this case.

Now I come to the second question. The judge proceeded to consider the nature of the remedy to which the plaintiff was entitled. He said: "The difficult question here, as I see it, is "the question of the appropriate relief to be granted to the "plaintiff in this case. The further contention of the defence "is, that even if the board was acting outside its powers and "therefore the dismissal of the plaintiff was something which "should be treated as a nullity, the plaintiff himself acquiesced "in it in that subsequent to his dismissal he has found other "employment and is, indeed, at present employed by the "Southampton Co-operative Society. I fail to find any real "force in that argument. He was prevented from following his "employment by the act of the Dock Labour Board, and under "those circumstances was left with no alternative but to try "and find other employment in order to earn a living, at least "until this matter could be decided one way or the other, and "under those circumstances I think it is clear that there must "be a finding here that the decision of the Dock Labour Board "suspending him as from November 22, 1952, should be void "and of no effect." The judge then considered whether a declaration should be granted or whether there was a sufficient remedy in damages in the circumstances of the case. He referred to certain passages from the judgment in *Barnard's* case,[2] about which I must say a word. In *Barnard's* case [2] a number of dock labourers raised questions as to their rights under the scheme, questions of a kind which were considered in this case. They did not ask for damages; they had been suspended for a week. They considered that their suspension was wrong. If all they had wanted had been a week's wages, they might well have resorted to the county court, but they desired to have a question of importance to both sides determined as to the interpretation of parts of the scheme. This court allowed the appeal and granted a declaration, the declaration asked for by each of the men. It was said, after long argument on the main issue, that there was no power in the court to grant a declaration in such a case: the remedy which the men had was to ask for an order of certiorari. In fact the time for doing that had gone. Both parties desired the question under the scheme to be determined. This court determined it, and the only way the court could put the matter in order was to grant declarations such as were sought in that case, and the court did so, pointing out that that form of remedy ought to be used sparingly. Ormerod J. pointed out that the same kind of question arose here in this case. There was keen contest, too, as to whether delegation was permissible.

The judge considered first the question whether or not he should grant a declaration. He then proceeded to deal with the question of damages. In my judgment the question ought to have been posed to the plaintiff: what remedy do you seek? If he had said that he sought both damages and a declaration.

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[2] [1953] 2 Q.B. 18.

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he might have been asked why, and he might have been asked to elect. If that had been done there would probably have been argument upon whether or not it was either necessary or desirable to grant a declaration. Mr. Harold Brown told this court that that question was not argued. Counsel upon the other side said that a declaration was asked for by Mr. Dingle Foot, who then appeared for the plaintiff, and that if there was no argument to the contrary that cannot be helped. Whenever a declaration is asked for consideration ought to be given to the circumstances in order to determine whether it is a remedy necessary to establish the plaintiff's rights. This was an action for damages for wrongful dismissal of a workman by his employers; damages were claimed on that basis. The first claim of the plaintiff in the county court was in the form I have read. When the statement of claim which was delivered on January 12, 1954, was drafted by Mr. Dingle Foot, paragraph 3 was in these terms: "As from November 22"—that is November, 1952—"the plaintiff ceased to be employed by the defendants." At that time it appears to be clear that the plaintiff was treating himself as wrongfully dismissed by the defendants, his employers. He was accepting their repudiation of the contract, and that would give him a right to damages. He should be regarded as having elected on that date, if he had not so done before, to treat the contract as repudiated and as at an end, and he claimed damages. At a later stage, in May, 1954, the statement of claim was amended and the words "be employed by the defendants" were struck out of paragraph 3 and new words were added. The paragraph as amended read: "As from November 22 the plaintiff ceased to perform duties for or on behalf of or at the request of the defendants and the defendants ceased to pay wages to the plaintiff." A new paragraph 6 was added to the statement of claim, which pleaded: "By their said notice the defendants repudiated their contract of employment with the plaintiff. The plaintiff elected to treat the said contract as discharged by the defendants' said repudiation. Alternatively the plaintiff elected to treat the said contract as still subsisting." Where that takes one I am not clear; but one thing on which I am clear is that it ought not to take one both ways. The plaintiff ought to have been put upon his election, and if he had been the case would have been much clearer than it is today. Mr. Brown told the court that paragraph 6, which is in alternative form, was added to the statement of claim on the suggestion of a judge in chambers. It may be that it was on someone else's suggestion to the judge in chambers; I do not know; but there it is and there it remains till this day. I think that it is embarrassing to the defendants. I am not sure how far it was considered before Ormerod J.

Now what is the position? If the judge was asked to give damages once and for all, he could have done so, and the breach of contract of which the plaintiff complains could have been answered by the granting to the plaintiff of the damages which he suffered through that breach, namely, through the defendants' wrongful dismissal of him. It is said that by reason of that which took place, and by reason in particular of clause 17 (3), and of earlier parts of the scheme, the plaintiff's name went off the register mentioned in the scheme, and he ceased to be a member of the reserve pool. He had been a dock labourer for 20 or 30 years, and his future would be affected if he could not work as a dock labourer. It looks, as I have said already, from the original statement of claim as though he had determined that his employment was terminated; he accepted that, and he wanted damages. In such a case, if the judge was giving damages as the sole remedy, he would have to fix the damages having regard to the nature of the plaintiff's loss. He lost something when he was wrongfully dismissed. The normal workman who is paid by the week is subject to a week's notice.

There are some complications in this case. In the first place, the plaintiff was uncertain what his position would be, and it is said that he was entitled to consider the question open until the case was heard. I think, for the reason I have given, that he had made up his mind that he was not going back to the defendants in any event. He obtained other employment. He did not ask to be taken back; even after the judgment given by Ormerod J., so far as I know, he never asked to be taken back. Thus, I wondered at an early stage during the hearing of this appeal what was the purpose of granting both damages and a declaration. I thought that damages could be a satisfactory remedy for the plaintiff without a declaration. I asked Mr. Quass, who appeared for the plaintiff, whether it was any use to him, and he said: "Oh, yes, it is of great use to him; it is the one thing he wants "to keep. He wants to go back to work on the docks, which "has been his life's work, apart, of course, for the last four "years." I think it is much to be regretted that this question was not discussed before the trial judge.

In my judgment, the wrong done to the plaintiff can be sufficiently compensated by an award of damages. There is

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something more than the case of an ordinary master and workman here, because of the value to a man of his being within the scheme. It may be of help to him; whether it is depends very much upon the man himself. The report of the hearing before the disciplinary committee shows that the plaintiff had been troublesome, and some of the documents before us show that too. The value of his position on the reserve pool was probably not as great as the value to a man who had what Mr. Brown described as a clean record. Still, there was some value in it.

On the other hand, there was, as I read the scheme, the right on the part of the employers, the National Board, under clause 17 (1) (*b*) to give him seven days' notice. He had some protection if they did so, for he could appeal to the appeal committee, and they would have to consider the matter anew under clause 18 of the scheme. Under clause 17 (2) "A registered "dock worker in the reserve pool who is available for work shall "not leave his employment with the National Board except by "giving seven days' notice in writing to the local board or "so as to be employed in accordance with the provisions of the "scheme." The man may give seven days' notice; so may the employer. If there is an appeal when the man is given seven days' notice, the appeal committee would have to consider the case.

Bearing in mind the fact that this man was really on a weekly wage, I should consider the sum of £250 damages much too high if it was a sum assessed by the judge up to the date of the trial only. Some two and a half years had elapsed. Here was a fit man of 52 who had been a dock labourer, and he claimed that he could not get work, and he was awarded £250 damages. I think it is right to say that that was based upon the period up to the hearing of the case. Mr. Harold Brown was inclined to argue that the judge's assessment was as general damages to cover all time. I am not clear that that is so from the judgment, but, unfortunately, this part of the case was not developed before the judge as it might have been. If the assessment of damages was only up to the date of trial, I should be inclined to yield to the submission of Mr. Harold Brown that the damages ought to be reduced.

Having heard full argument on both sides, I am satisfied that a declaration ought not to have been granted in the circumstances of this case. I state my reasons. The first is that the granting of a declaration is discretionary. The discretion is one to be exercised by the judge, and this court will seldom interfere with

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the exercise of a judge's discretion upon such a matter. I feel that the question as to a declaration was not fully developed before the judge, and for the reasons I shall give I do not think, if it had been, that he would have granted a declaration. There is no reason, so far as I see it, why damages should not be sufficient remedy for a plaintiff in a case such as this. He has been awarded damages; he desires to keep the declaration. For what purpose? So that he can go back and say to the employers, the National Board, "I am on the pool; now please employ "me"? And if they say: "You have been a great deal of "trouble, we would rather not," he may begin an action claiming damages again. He has had the advantage of legal aid in this case in order to bring his claim. It has been a great help to him, I have no doubt; but I do not think that it would be right in the circumstances of this case to prolong the issue between these parties or to give encouragement to fresh proceedings. The National Board was constituted under this scheme for the purposes stated in the scheme. If there is to be a declaration in this case, followed perhaps by declarations in other cases, so that a man who has been dismissed can go back and say: "Not "only have I got damages but I have got a declaration. Now "employ me again," and if another action is to come about because they do not employ him, it would be burdensome, and those responsible for the working of the scheme have enough to do. The object of the scheme was to promote harmony in working and to bring about regularity as far as possible. The wrong done to the plaintiff can be adequately met by payment of damages to him.

I am satisfied that it is in everyone's interest that this court should say that the declaration granted to the plaintiff should be set aside. Over and above that, I am satisfied that the sum of £250 awarded as damages is well sufficient to cover anything that could properly be awarded to the plaintiff if damages were assessed once and for all.

For those reasons it seems to me that the appeal generally should be dismissed, except that the grant to the plaintiff of the declaration should be set aside.

JENKINS L.J. I agree with my Lord that the judge was right in holding that the plaintiff's purported dismissal by the defendants as from November 22, 1952, was illegal, ultra vires and invalid, but if the matter rested with me I would be disposed, differing in this respect from my Lord, to hold that the judge was also right, having stated the legal position to be as I have said, in granting a declaration to that effect.

As my Lord has said, the granting of a declaration is a matter of discretion, and one starts with this: that the judge, in the exercise of his discretion, thought fit to make a declaration in this case; and his decision in the exercise of his discretion should not be disturbed unless this court can be satisfied that he proceeded upon some wrong principle. For my part, I am unable to discern any application of a wrong principle by the judge in this matter; on the contrary, I would agree with the conclusion at which he arrived.

It is said that this scheme is comparable, for the present purpose, to a contract between master and servant, and it was pointed out in argument that nobody had ever heard of a case of wrongful dismissal where the relief claimed, or the relief granted, included a declaration that the plaintiff had been invalidly dismissed. It was said that that precedent or analogy should be followed in this case. But in the ordinary case of master and servant the repudiation or the wrongful dismissal puts an end to the contract, and the contract having been wrongfully put an end to a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more.

In the present case we are concerned with a statutory scheme which has given a number of rights and imposed a number of obligations going far beyond any ordinary contract of service. I find in clause 10 (1) this: "No person other than a registered "employer shall engage for employment or employ any worker "on dock work nor shall a registered employer engage for employment or employ a worker on dock work unless that worker "is a registered dock worker." The scheme thus restricts the employment of dock workers to those who are registered under the scheme. That makes exclusion or inclusion in the scheme vital to any person who wishes to pursue the trade or calling of a dock worker. Then I find in clause 8 (2): "A registered dock "worker in the reserve pool"—and the plaintiff in this case answers that description—"who is available for work"—and the plaintiff was available for work within the meaning of the scheme—"shall be in the employment of the National Board." There one has what amounts to a statutory enactment to the effect that the dock worker is to be in the employment of the National Board so long as certain conditions are fulfilled, that is to say, so long as he is a registered dock worker in the reserve pool available for work. All these conditions were satisfied in the plaintiff's case.

Then I find under clause 17 (1): "The employment of a "registered dock worker in the reserve pool who is available for "work shall not be terminated except—(a) by summary dismissal "in the case of serious misconduct; or (b) by the giving of seven "days' notice in writing; or (c) so as to enable the worker to "be employed in accordance with the provisions of the scheme." Thus one has under clause 8 (2): "A registered dock worker in "the reserve pool who is available for work shall be in the "employment of the National Board"; and one has a further provision equivalent to a statutory provision that the employment of a registered dock worker shall not be terminated except in certain specified ways. I should add that clause 18 gives certain rights of appeal against such termination.

I think that the force of those provisions is not in any way affected by the circumstance that the dock worker himself is given the right to terminate his employment by seven days' notice in writing on his part. If there was no such right, this scheme would be oppressive indeed, for it would involve every dock worker in compulsory continuance in the scheme without any opportunity of getting out of it.

In the face of those provisions, to my mind, it becomes plain that no analogy to this case can be found in the case of master and servant. If the judge was right in the conclusion to which he came on the question of the purported termination of the plaintiff's employment, if the plaintiff's dismissal was indeed illegal, ultra vires and invalid, then, so far as I can see, the position now must be that the plaintiff's name was never validly removed from the register, and that he was never validly dismissed. The conditions stated in paragraph 17 (1) were not fulfilled, and he, as I see it, in the eye of the law must be considered as having continued in the employment of the National Board, as the scheme said he was to continue. What objection is there? Why should it be wrong, those being the plaintiff's rights, for the court to make a declaration to the effect that his purported dismissal was ultra vires and invalid if in law he is to be regarded as still in the employment of the National Board? Why should he not be entitled to have his rights vindicated and made known to the world by a declaration? For my part I can see no reason.

It is said that a declaration would tend to produce further litigation. I cannot agree. I think that I asked Mr. Brown, and I think he agreed—I am sure that he would have agreed if I had asked him—that if a declaration were made in this form the National Dock Labour Board would comply with its terms without any question whatever. What, then, would result? The plaintiff having gained his declaration would return physically to the employment of the National Dock Labour Board, in which he has in the eye of the law continued ever since his purported dismissal. His name would be restored to the register from which it should never have been removed and he would take his place in the pool. From then onwards the matter would take one of two courses. Either the plaintiff would prove more co-operative in the future than he has in the past, in which case the local dock labour board would have the advantage of the services of another willing and competent dock worker; or else he would revert to his old habits, in which case it seems probable that before long an opportunity would arise for the justifiable termination of his employment by seven days' notice. If that were done and the grounds of the notice were held to be adequate on appeal, then the plaintiff would be validly dismissed and would have no more to say. There would be no question either way of any repeated claim for damages.

It is said that damages would be an adequate remedy for the wrong which the plaintiff has suffered. Speaking for myself, I cannot follow that. Here is a man who had been employed in the docks as a dock worker for 30 years or more. It was his life's work; it was a trade which he had pursued from boyhood. Why should he be removed from that employment if he wishes to continue in it? Why should it not be a consideration, in deciding whether damages is an adequate remedy or not, that a man prefers one way of life to another? I can see no reason for holding that damages here are necessarily an adequate remedy. On the other hand, a declaration would necessarily be an adequate remedy, for by definition it would exactly fit the legal rights of the parties. The inconvenience of a declaration in a case of this sort can, I apprehend, be exaggerated. The declaration here would merely mean that this man would once more be a dock worker in the pool, under an obligation to hold himself in readiness for, and to report for, any employment that might be found for him under the scheme. I cannot see that there is a serious prospect of any real inconvenience from his returning to that position.

Then it was said that the plaintiff showed no desire to go back to dock work. In my view it does not lie in the mouth of the defendants to avail themselves of that point. It was through their wrongful act, unwittingly wrongful it is true, but wrongful nevertheless, that this man was excluded from their employment. If he considered that as a state of affairs to which he had no option but to bow, and he went elsewhere and sought other employment, how can it fairly or properly be said that he acquiesced in his exclusion? For my part I cannot see how.

It was also said that the plaintiff has in some way elected not to ask for reinstatement, which was what a declaration would amount to. In my view, no fair reading of the pleadings could really lead to that conclusion. It is said that in the statement of claim, as originally delivered, the plea was "As from "November 22" (1952) "the plaintiff ceased to be employed by "the defendants." But read the next paragraph, "the purported "termination of the plaintiff's employment was illegal, ultra "vires and invalid in that the said employment was not "terminated by the local board as required by clause 16 of the "said Dock Workers (Regulation of Employment) Scheme, 1947, "embodied in the said Order." That is the essence of the case. That is the issue stated in plain terms, and the consequences that might or might not ensue from this purported but invalid termination were matters of law, and if they were in some respects imperfectly stated in the pleading as originally delivered, I do not think that the plaintiff should be prejudiced by that. It would be a sad day when litigants were bound hand and foot by every ill-advised phrase or argument or submission that may find its way into their pleadings as settled by counsel.

For the reasons I have endeavoured to express, which I express with diffidence, I for my part would be disposed to hold that the declaration granted by the judge should stand. But if that view were to prevail, I should add that I would be disposed to agree with my Lord that the sum of £250 damages, considered as relief given in addition to the declaration, to cover the period down to the trial, was too high.

PARKER L.J. I agree with the conclusion reached by Singleton L.J. The decision to dismiss the plaintiff by giving him seven days' notice was a decision, it is said, of a body called the disciplinary committee, not the decision of the local board which under clause 16 alone could give him seven days' notice. In these circumstances the plaintiff claims that the notice was a nullity, and reliance is placed in particular on the decision of this court in *Barnard's* case.[3] Mr. Brown, for the defendants, points out that the position here is somewhat different. In *Barnard's* case[3] there was a clear delegation to an outside person, the port manager, whereas here the delegation was to two members of the board itself. The way Mr. Brown puts it is this. He says that it is just as if the local board had decided that for certain purposes, namely, for the purposes of discipline, a quorum of two should suffice; and he adds that the board in this case, in appointing the committee, were really doing no more than anticipate what Denning L.J. said in a passage of his judgment in *Barnard's* case.[3] In that case Denning L.J. said[4]: "It was "suggested that it would be impracticable for the board to sit "as a board to decide all these cases; but I see nothing impractic-"able at all; they have only to fix their quorum at two members "and arrange for two members, one from each side, employers "and workers, to be responsible for a week at a time: probably "each pair would only have to sit on one day during their week."

The position, as it seems to me, is this. I agree with Mr. Brown that there would be nothing wrong in a local board having a different quorum (say a quorum of two) for disciplinary matters against the quorum of seven which they fix for normal business. That means no more than this, that the local board is the party to decide disciplinary matters, though only two will suffice to form a quorum; and if that were the position here (and I think it was the position which Denning L.J. had in mind), it could not be said that the decision of the disciplinary committee was not that of the local board. But in the present case the disciplinary committee is to consist of two persons. In other words, it is not the decision of the local board. No other members of the local board may attend, and the committee is to consist, and to consist only, of two.

In those circumstances it seems to me that the position is exactly as in *Barnard's* case,[5] the local board having no powers, express or implied, of delegation in what is admittedly a quasi-judicial matter.

The matter does not quite end there, because Mr. Brown advances a further argument based on the wording of clauses 16, 17 and 18. I find it unnecessary to go through those clauses in detail. It is sufficient to say that the argument runs in this way. It is said that clause 17 refers expressly to the termination of employment of a person in the reserve pool, as undoubtedly the plaintiff was in this case, whereas under clause 16 (2) there is no reference to a registered dock worker in the reserve pool. He further draws attention to clause 18, where the appeal in respect of a dismissal by a seven days' notice is an appeal from a decision under clause 17 and not under clause 16. In those circumstances Mr. Brown advances what is certainly an attractive argument, that clause 16 (2) must be dealing with somebody other than a person in the reserve pool; and he suggests that the powers given to the local board in clause 16 to terminate the employment by a seven days' notice, or to dismiss a worker summarily, are referring to the engagement or employment of the worker by the employer to whom he is allocated and not a termination of his employment by the National Dock Labour Board.

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[3] [1953] 2 Q.B. 18.
[4] Ibid. 40.
[5] [1953] 2 Q.B. 18.

I find it unnecessary to come to a conclusion on the matter. Suffice it to say that as at present advised I find it almost impossible to accede to Mr. Brown's argument. There is no limitation in clause 16 (2) as to the nature of the employment that is to be terminated. He further concedes that so far as the powers under clause 16 (2) (*a*) are concerned they apply, and can apply only, to somebody in the reserve pool. Finally, it is to be observed that the powers given by clause 16 (2) are powers given without prejudice to, and in addition to, the powers conferred by clause 15. Without reading clause 15 it is enough to say that that clause clearly refers to workers in the reserve pool, in part at any rate.

However that may be, it seems to me that the real answer to Mr. Harold Brown's contention is this, that whether the disciplinary committee were acting under clause 16 or under clause 17 they were undoubtedly acting in a disciplinary matter, and clearly their functions were quasi-judicial. If they were acting under clause 17, then again, if the local board is the person who may terminate the employment under that clause, the delegation to the disciplinary committee was invalid. Equally, if it is the National Dock Labour Board itself who alone can terminate under clause 17, it cannot be said that a disciplinary committee was a body to whom the powers under clause 17 were validly delegated by the National Dock Labour Board, because by clause 3 (3) of the scheme the National Dock Labour Board could only delegate to local boards. Accordingly, it seems to me that the decision to give this notice to the plaintiff was invalid.

The real difficulty that I have felt in this case, and I think a difficulty which the judge felt, was as to the appropriate relief. When the judge heard the case the position was that by paragraph 6 of the amended statement of claim the plaintiff put his case in two ways. He said first: "By the said notice the "defendants repudiated their contract of employment with the "plaintiff. The plaintiff elected to treat the said contract as "discharged by the said repudiation." Then the pleading went on: "Alternatively the plaintiff elected to treat the said contract "as still subsisting." Particulars were asked for under both heads of that plea, and particulars were given. Apparently (so we are told) the plaintiff was never asked at the trial what he wanted. He was never put to his election; and even if the matter was argued it is clear that it was but scantily argued. No doubt the questions as to the true interpretation of the clauses of the scheme were the matters really debated, and little attention appears to have been paid to the position of the plaintiff, namely, whether he was electing to treat his contract with the board as subsisting, claiming damages only up to the date of trial, or whether he had treated the notice as a repudiation of the contract and was claiming only damages. The judge, however, I think clearly proceeded on the former basis. It is true that there are passages in his judgment where it looks as if he was dealing with a case of damages for wrongful dismissal alone; but I think on reading the judgment as a whole it is plain that the judge was treating the plaintiff as having elected to treat the contract as still subsisting, and that when he came to award damages he was only concerned with damages up to the date of trial.

What seems to me to have been overlooked is the fact that, in my view, before the date of trial the plaintiff had made his election and had clearly elected to treat the breach as a repudiation of the contract and to claim damages. The action was begun in the county court. The plaintiff himself made out his claim in simple form: "Claim for loss of wages and damages "the sum of £136 due to me, wrongful dismissal from the "scheme." That was made out by the plaintiff himself, and I would be the last to hold that against him. He did go off and seek for work, and again, whatever attitude he was going to take up that was the proper course to take. But when it comes to the transfer to the High Court and the statement of claim is put in, it seems to me that the claim is and can only be on the basis of a claim for wrongful dismissal only. By paragraph 3 the pleader says: "As from November 22" (that is 1952) "the "plaintiff ceased to be employed by the defendants." It was only at a late stage—it is said at the suggestion of Slade J. sitting in chambers—that the statement of claim was amended and paragraph 6 inserted in the terms which I have already read. When that had been done the defence to the amended statement of claim was put in, in which by paragraph 8 the defendants, having denied that they repudiated the contract, said: "Alternatively if the defendants failed to terminate "validly the said contract of employment as alleged herein and "if the purported termination amounted to a repudiation thereof "the defendants admit that the plaintiff elected to treat the "said contract of employment as discharged."

In my view the plaintiff cannot say one thing one moment and one thing another. If he makes his final election as to the course he will pursue, he cannot thereafter turn round and claim on a different basis. I think that the position when the matter came for trial was that whatever the plaintiff then said—and, as I have said, he was not then asked what he intended—he had already elected, and the case fell to be treated only as one for damages for wrongful dismissal.

Assuming, however, that I am wrong and that it was open to the plaintiff to treat the contract as still subsisting and to claim a declaration and damages up to the date of trial, I confess that for my part I do not think that a declaration ought to have been granted in this case. It is a discretionary remedy. It is to be granted sparingly, and although it is a matter for the judge—it is his discretion—yet it seems to me that in this case he approached the matter, in part at any rate, on a wrong reading of the decision in the *Barnard* case.[6] He failed, I think, to appreciate that unless a declaration were given in the *Barnard* case[6] it was impossible to adjudicate on the point which had arisen. Men had been suspended only for seven days—no question of their contracts being terminated—and they had put in no claim for monetary relief. The board having taken the view that they were entitled to act as they did, and having argued that case throughout, the only way in which the matter could be decided was by the granting of a declaration.

So far, of course, as a contract between master and servant is concerned, it would be quite impossible, whatever a servant said he desired, to grant a declaration that in effect he was still in the employment of the master, and Mr. Quass, for the plaintiff, recognized that that would be an utterly impossible position. But he says, I think rightly, that in the present case there is something more than the contract between master and servant. He says that the plaintiff, and I again think rightly, has a status under this scheme, which was set up by Act of Parliament, and

[6] [1953] 2 Q.B. 18.

that the position is very much the same as if a man were wrongly expelled from his trade union or a member from his club, in which case the appropriate remedy might well be, and perhaps could only be, by way of a declaration. Nevertheless, as it seems to me, there is here a relationship of master and servant between the parties. It is true, as I have said, that there is something more, but that something more can well be reflected in any damages which are awarded, and looked at in that way damages are an adequate remedy, and the only remedy which in such a case should be allowed.

So far as damages are concerned, I have nothing to add to what my Lord has said. It seems to me that the sum of £250 and no more should be awarded to the plaintiff as damages, not merely up to the date of trial but as damages for all time, on the basis of a wrongful dismissal.

*Appeal dismissed, save that declaration struck out of order.*

Solicitors: *Bell, Brodrick & Gray; White & Leonard for Geoffrey Wells & Woodford, Southampton.*

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C. A.
1956
*Feb.* 10, 13, 29.
Denning, Morris and Parker L.JJ.

## REGINA *v.* COUNTY OF LONDON QUARTER SESSIONS APPEALS COMMITTEE. *Ex parte* ROSSI.

*Justices—Appeal to quarter sessions—Notice of hearing—Appeal from dismissal of bastardy summons—Notice of date of hearing served on parties—Hearing adjourned sine die—Notice of date of adjourned hearing served on respondent by registered letter—Letter returned undelivered to clerk of peace—Meaning of "in "due course give notice" of date for hearing—Whether "hearing" includes adjourned hearing—Whether sending by post sufficient where non-receipt proved—Summary Jurisdiction (Appeals) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 38), *s.* 3 (1)*—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *ss.* 1, 26.

*Statute—Construction—Service of document by post—Meaning of "sent"—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 26.

*Justices—Quarter sessions—Jurisdiction—Power to set aside own orders. Crown Practice—Certiorari—Absence of party—Order against him by inferior tribunal—No fair notice of proceedings.*

The clerk of the peace to a quarter sessions appeals committee gave notice, pursuant to section 3 (1) of the Summary Jurisdiction

(Appeals) Act, 1933,[1] of the date, time and place fixed for the hearing of an appeal by the mother of an illegitimate child from the dismissal of her summons against a man whom she alleged to be the father of the child. The respondent attended in person on the day stated, but was not present when the case was called on, mentioned to the court, and adjourned sine die for the convenience of the appellant. Another date was fixed, and the clerk of the peace gave notice of the date fixed for that hearing, sending the notice to the respondent, as section 3 (1) permitted, by post "in a "registered letter addressed to him at his last or usual place of "abode." The letter was returned to the sender marked "Un-"delivered. . . . No response." The respondent did not appear on the date fixed for the hearing. The undelivered letter was before the court, but the court accepted the evidence of the appellant that the respondent was evading service, heard the appeal in his absence, and made an order against him. The respondent applied for an order of certiorari to quash the proceedings:—

*Held*, (1) that the word "hearing" in section 3 (1) included "hearings"; that the duty of the clerk of the peace was accordingly (orally or otherwise) to give notice of the date, time and place fixed not only for the original hearing but also for an adjournment sine die; and that the clerk of the peace had correctly sought to serve notice of the adjourned hearing.

(2) That in the context of legislation designed to give parties to an appeal time and opportunity to prepare for and appear at proceedings which were in substance a rehearing of the original matter the primary obligation under section 3 (1) to "give notice" "in due course" had not been satisfied by adopting the permissive method of sending the notice by post in a letter which was proved never to have been received by the party interested. The words imported the requirement that the notice given should be received by the party interested within a reasonable time; and interpreted in the light of section 26 of the Interpretation Act, 1889[2] (as to effecting service of a document by sending it by post), the service

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[1] Summary Jurisdiction (Appeals) Act, 1933, s. 3 (1) (as amended): "In the case of an appeal to which "this Act applies, on receipt of any "notice of appeal required by rules "made under section 15 of the "Justices of Peace Act, 1949, to be "sent by a clerk to justices to the "clerk of the peace, the clerk of the "peace shall enter the appeal, and "shall in due course give notice to "the appellant, to the other party to "the appeal, and to the clerk to the "court of summary jurisdiction as to "the date, time and place fixed for "the hearing of the appeal. A "notice required by this subsection "to be given to any person may be "sent by post in a registered letter "addressed to him at his last or "usual place of abode."

[2] Interpretation Act, 1889, s. 26: "Where an Act passed after the "commencement of this Act autho-"rizes or requires any document to "be served by post, whether the "expression 'serve,' or the expres-"sion 'give' or 'send,' or any other "expression is used, then, unless the "contrary intention appears, the "service shall be deemed to be "effected by properly addressing, "prepaying, and posting a letter con-"taining the document, and unless "the contrary is proved to have been "effected at the time at which the "letter would be delivered in the "ordinary course of post."

of this notice could not be "deemed to be effected" in the ordinary course of post, because it was proved never to have been effected in time or at all. Accordingly, there had been a defect in procedure and an order of certiorari should be granted to quash the proceedings.

*Per* Denning L.J. Evading service would be a ground for ordering personal or substituted service, but not for dispensing with service altogether. Quarter sessions has the same power as the Queen's Bench to set aside its own orders where these have been regularly obtained in the absence of an interested party, or where they have been irregularly obtained without proper service.

Decision of Divisional Court reversed.

Appeal from Divisional Court.

On May 20, 1953, a child was born to Lilian Daisy Minors, a married woman separated from her husband. On May 7, 1954, she issued a summons against Alfred Rossi, the present appellant, alleging that he was the father of the child. After a three-day hearing before the metropolitan magistrate at Greenwich Magistrates' Court, at which Mrs. Minors was represented by counsel and Rossi first appeared in person and later, having obtained legal aid, by solicitors, the magistrate dismissed the summons against him. On July 8 Mrs. Minors gave notice of appeal to the clerk of the magistrates' court and to Rossi, pursuant to section 84 (1) of the Magistrates' Courts Act, 1952; and on August 6, 1954, the clerk of the peace for the County of London, pursuant to section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933 (as amended by the Criminal Justice Act, 1948, and the Magistrates' Courts Act, 1952),[1] gave notice to Mrs. Minors, to Rossi, and to the clerk to the court of summary jurisdiction as to the date, time and place fixed for the hearing of the appeal, namely, August 13, 1954, at 10.30 a.m. at the Sessions House, 181, Marylebone Road, N.W.1. Attached to the notice was a slip saying: "If this appeal should not be reached on the day stated "in this notice, it will normally be heard at the next available "sitting of the Appeal Court, but you should apply to the clerk "of the peace as to this before leaving the court."

On August 13, Mrs. Minors and her counsel attended the court of quarter sessions. Rossi attended in person. He was not, however, present in court when the case, having been called on, was mentioned by counsel for Mrs. Minors. Counsel told the court that he fancied that Rossi had been called but that he was not represented and was unlikely to be there on that day; and went on to say that Mrs. Minors was in difficulty owing to the absence of witnesses who, it was said, had refused to attend; and counsel asked for an adjournment for some period longer than a week. The court granted the application and adjourned the hearing sine die. Later on that day Rossi, who had been in the vicinity of the court, was told by an official that the case would not be heard on that day. He was not given the date for the adjourned hearing, for at that time no one knew that date.

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[1] For note see p. 683.

Five weeks later, on September 21, 1954, the clerk of the peace sent letters by registered post to Mrs. Minors and to Rossi, giving notice that the hearing of the appeal was fixed for Thursday, September 28. The letter to Rossi was addressed to him at his usual address but was returned to the sender by the postal authorities marked: " Undelivered for reason stated. . . . " No response. 22.9.54." When the case came on on September 28, the returned letter was produced to the appeals committee but was not put in evidence. Evidence, however, was given by Mrs. Minors, who was represented by counsel, that on the previous appeals day Rossi had been told that " the case would " come up at the end of September," and her counsel asked the court to allow the appeal to proceed in Rossi's absence, because he (counsel) was in a position to prove that Rossi was concealing himself in order to evade service of the notice. After hearing Mrs. Minors' evidence the court decided in the exercise of its discretion to hear the case in Rossi's absence, and, after hearing witnesses for Mrs. Minors, adjudged him to be the father of the child and ordered him to pay £1 a week for the child and 10 guineas costs. After that order had been served on Rossi he obtained legal advice and applied to the Divisional Court for an order of certiorari to bring up and quash the order of quarter sessions. In his affidavit he stated that " during the time " between August 13 and September 29, 1954, I visited Kent " to do some fruit-picking."

The Divisional Court did not have before it the transcript of the hearing before the appeals committee on August 13, 1954, and was accordingly not apprised of the fact that the case had on that occasion been adjourned sine die; and the Divisional Court proceeded on the basis that it had not been reached on that day. The court did not call on counsel for Mrs. Minors, but he (counsel) directed their attention to the provisions of section 3 (1) of the Act of 1933. The court on October 13, 1955, dismissed the application for certiorari, Lord Goddard C.J. stating that there had been no failure to observe the procedure laid down by section 3 of the Act of 1933. There was no question but that the clerk of the peace had given notice of the appeal on August 13, 1954, because Rossi had appeared. His Lordship continued: "The section does not go on to say that notice of adjournment "is to be given. He (Rossi) was told so. The evidence was that "the case would be heard on the next day. Not only that, but "if notice is given, it does not mean that personal notice is to "be given. . . . Supposing a man has gone away from his "address and nobody knows where he is, what can one do "except send a letter to him? If he does not choose to make "arrangements to receive these notices of proceedings in which "he is interested, that is a matter for him. It may be . . . he "could have gone back to quarter sessions and explained his "absence. Certainly terms would have been imposed and "sessions might—I am not saying they would—have heard the "case; but what I am quite certain about is that this court "cannot grant certiorari, because there is no excess of jurisdic-"tion, and we cannot grant certiorari . . . merely on vague "grounds of theoretical justice or something of that sort. . . . "There has been no defect in the procedure. The adjournment "or no adjournment was a matter of discretion for the court." Ormerod and Glyn-Jones JJ. concurred.

The applicant appealed.

*J. E. S. Simon Q.C.* and *Neville Vincent* for the applicant. First, there has been here such a fundamental defect in the administration of justice, in that the applicant was not given an opportunity of being heard, that the proceedings were a nullity and certiorari should lie: see Halsbury's Laws of England, 3rd ed., vol. II, pp. 64–66, on "natural justice," and *Rex* v. *North, Ex parte Oakey.*[3]

Secondly, the word "hearing" in section 3 (1) of the Act of 1933 should be given the wider meaning to cover the whole judicial process until final determination, and should not be limited to the occasion when the case first appears in the list. That is in accord with the principle enunciated by Lord Herschell L.C. in *Arrow Shipping Co. Ltd.* v. *Tyne Improvement Commissioners (The Crystal),*[4] that where two interpretations of a statute are possible, the wider interpretation should be given to secure justice to a litigant. An adjournment sine die in any event amounts to an "unfixing" of a hearing previously fixed, and demands a new compliance with the statute. The clerk of the peace understood section 3 in that wider sense, and it can therefore be assumed that that was the practice of the court: cursus curiae lex curiae. [On the meaning of "hear" *Green* v. *Lord Penzance*[5] was also referred to.] *Fletcher* v. *Baker*,[6] and *Reg.* v. *Registrar of the County Court at Leeds*,[7] which followed it, are distinguishable, for they turned on a statute not in pari materia with the Act of 1933, and on a particular county court rule. Moreover, in section 3 (1), read with section 1 (1) (*b*) of the Interpretation Act, 1889, the words "date, time and place "of the hearing" include the plural, since no contrary intention appears; and "hearing" must therefore include "hearings" and "adjourned hearing."

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[3] [1927] 1 K.B. 491; 43 T.L.R. 60.

[4] [1894] A.C. 508, 516.

Thirdly, the notice has not been given "in due course," as the section requires, because the contrary appears on the face of the record, namely, that it was never given at all; and therefore there has not been sufficient compliance. If, as Lord Goddard C.J. thought, the applicant was told that the case would be taken "on the next appeal day at the end of September," that would cover place, but for a layman it would not sufficiently cover date and time. "In due course" means "within a reasonable time "to allow the parties to prepare their cases."

Fourthly, if section 3 is read in conjunction with section 26 of the Interpretation Act, 1889, the provision in section 26 that service by post "shall be deemed to be effected" if it is sufficiently sent, although not received, is qualified by the words in the second half of section 26, "unless the contrary is proved." Here the contrary is proved, for the court knew that the letter had come back undelivered. It is also a matter for complaint that no evidence was given as to when the letter was sent, and that the letter was not put in evidence but merely handed up to the chairman.

Fifthly, though section 3 permits notice to be sent by post, that is only one method of "giving notice," and sending by post is not proof of receipt.

*Michael Pearson* for the respondent. The court believed the witnesses who gave evidence that the applicant knew the date of the hearing in sufficient detail and was deliberately evading service of a notice which he knew would come, or at least went hop-picking for six weeks when he knew that the appeal stood adjourned. The sum of the evidence is that he knew, or, if he did not know, every possible step was taken to inform him, and the court could do no more than they did. Section 3 of the Act of 1933, unlike the Magistrates' Courts Rules, 1952, r. 76 (2), does not require proof that a person actually received the communication if he does not appear to a summons served by registered post.

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[5] (1881) 6 App.Cas. 657, 678, *per* Lord Blackburn.

[6] (1874) L.R. 9 Q.B. 370.

[7] (1886) 16 Q.B.D. 691.

If the statute provides that notice shall be "sent," sending is sufficient compliance with it: see *Sandland* v. *Neale*[8] on section 21 of the Road Traffic Act, 1930, in which the Divisional Court held that a notice of intended prosecution was sufficiently served if it was placed beside the unconscious defendant in hospital. It was the sending and not the receiving which was decisive.

The words "unless the contrary is proved" in section 26 of the Interpretation Act, 1889, apply only when "time" is relevant and in dispute, and do not apply to the first part of the section. If it is a consequence of the words of a statute that an order can be made against a person of which he has no knowledge, it is dangerous, as Lord Simonds warned in *Magor and St. Mellons Rural District Council* v. *Newport Corporation*,[9] for the courts to try to fill the gaps in legislation. The remedy for omissions by the legislature is an amending Act.

*Van Grutten* v. *Trevenen*,[10] *Stanley* v. *Thomas*[11] and *Retail Dairy Co.* v. *Clarke*[12] also show what is required when a statute provides for notice to be "sent" to other parties. Even the Criminal Appeal Rules, 1908, provide that "sending" is sufficient: see Archbold's Criminal Pleading, Evidence and Practice (1954 ed.), p. 317, rule 4 (*b*); and the proviso to section 33 of the National Service Act, 1948, would be meaningless unless the draftsman had read section 26 of the Interpretation Act, 1889, in the way it is submitted it should be construed. "Give notice" in section 3 (1) means "notice must be sent" and not "notice "must be received." The applicant had the notice of appeal; the further communications to him were matters of courtesy only. There are safeguards for a party in that (a) quarter sessions has a discretion to hear the appeal in the absence of one party, and (b) the appellant from the dismissal of a bastardy summons has to prove her case, which must be corroborated.

[DENNING L.J. Can quarter sessions set aside their order, as Lord Goddard C.J. seemed to suggest might be done?]

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[8] Ante 241; [1955] 3 All E.R. 571.

[9] [1952] A.C. 189, 190–191; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[10] [1902] 2 K.B. 82; 18 T.L.R. 575.

[11] [1939] 2 K.B. 462; 55 T.L.R. 711.

[12] [1912] 2 K.B. 388; 28 T.L.R. 361.

When the session has come to an end, the court is functus officio. There may therefore be no remedy for a man whose case has been heard in his absence.

[DENNING L.J. referred to *Hession* v. *Jones*,[13] and asked whether the legislature could have intended that a case concluded by an irrevocable order should be decided by the court when a party had had no notice of the hearing.]

One can only look at the statute. Nothing in the Act of 1933 lays on the court a duty other than sending a notice. Even a hearing adjourned sine die was the same "hearing." The applicant should have kept in touch with the court. His conduct disentitled him from justice. Even if certiorari could lie to review what happened, this is not a proper case in which to exercise it, for there is no error on the face of the record, which shows that he was served with two notices and told orally.

[MORRIS L.J. There is no evidence that oral notice was given for this particular date.]

Notice was given of methods of finding out, and that would satisfy any rule of natural justice.

*Simon Q.C.* in reply. The proof that this applicant was not evading the notice is his conduct in pursuing these proceedings. The court is not being asked to rewrite the statute but only to give to the words "hearing" and "notice" the wider interpretation to which they are susceptible, bearing in mind the purpose of the statute, which is to prevent a miscarriage of justice. The cases cited on "sending notice" are distinguishable, for there is a vital difference between "giving notice" and "sending a "notice." "To give notice" means "to bring home to the "mind of the person who is affected by the information in "question." In *Sandland* v. *Neale*[14] the notice *had* to be sent; here it is permissive to send by post. The authority of *Stanley* v. *Thomas*[15] was considerably weakened in *Holt* v. *Dyson*.[16] In the latter case the police had complied literally with section 21 of the Road Traffic Act, 1930, read with section 26 of the Interpretation Act, and it was held that there was an overriding obligation on the police to act reasonably in such matters. *Retail Dairy Co.* v. *Clarke*[17] contains a useful statement by Ridley J. on "sending," namely, that in the ordinary course it means dispatching, but that used with other words it may imply such a sending as that the thing by the time specified shall pass into the hands of the person to whom it is sent. The words "in due "course" imply that time must elapse after receipt of the notice. [*Reg.* v. *Recorder of Richmond*[18] was also referred to.]

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[13] [1914] 2 K.B. 421; 30 T.L.R. 320.

[14] Ante 241.

[15] [1939] 2 K.B. 462.

[16] [1951] 1 K.B. 364; 66 T.L.R. (Pt. 2) 1009; [1950] 2 All E.R. 840.

[17] [1912] 2 K.B. 388, 393.

It is conceded on section 26 of the Interpretation Act, 1889, that where anything is "deemed to be effected," the legal fiction overrides the fact; but in the present case there is no contradiction between legal fiction and fact, for the words "in due course" import time as a relevant consideration, and therefore "the "contrary is proved," namely, that the notice was not received in the ordinary course of post or at all. Though the Magistrates' Courts Act, 1952, ss. 45–47, do not apply to the appeals procedure, they show the importance which the legislature attaches to bringing the parties before the court. The second notice sent to this applicant was not a mere courtesy but a statutory requirement. The applicant's only remedy is by certiorari.

*Cur. adv. vult.*

Feb. 29. Denning L.J. stated the facts and continued: The Divisional Court refused the application. Lord Goddard C.J. said: "There is no ground for saying that there has been any "failure to observe the procedure which is laid down by law. . . . "The section [of the Act of 1933] does not go on to say that "notice of adjournment is to be given. . . . If he does not choose "to make arrangements to receive these notices of proceedings "in which he is interested, that is a matter for him. It may "be—I am not expressing an opinion about this—he could have "gone back to quarter sessions and explained his absence. "Certainly terms would have been imposed and sessions might "—I am not saying they would—have heard the case; but what "I am quite certain about is that this court cannot grant "certiorari . . . There has been no defect in the procedure."

Mr. Rossi appeals to this court. The case raises questions as to what is proper service on appeals to quarter sessions. This is governed by section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, which states that "the clerk of the peace ". . . shall in due course give notice to the appellant, to the "other party to the appeal, and to the clerk to the court of "summary jurisdiction as to the date, time and place fixed for "the hearing of the appeal. A notice required by this subsection

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[18] (1858) 27 L.J.M.C. 197.

"to be given to any person may be sent by post in a registered "letter addressed to him at his last or usual place of abode."

There is no doubt that the clerk of the peace gave due notice of the first day for hearing, August 13, 1954. He sent a letter by registered post to Mr. Rossi, who received it. Indeed, Mr. Rossi attended that day to answer the appeal. The Lord Chief Justice seems to have thought that that was the only notice that need be given. He thought that so long as notice was given for the first day fixed for the hearing, no notice need be given of the second date. I cannot agree. It is just as important for the defendant to know the date of the adjourned hearing as the date of the original hearing. The word "hearing" in section 3 (1) includes "hearings." Of course, when a trial goes on from day to day, it is sufficient for the chairman at the end of each day to announce the time of the next sitting of the court. But when a case is adjourned sine die, it is incumbent on the clerk of the peace to give notice of the adjourned hearing just as he would of the original hearing.

The clerk of the peace acted on that footing. He sent a letter by registered post to Mr. Rossi telling him the date, time and place of the adjourned hearing; but it was returned to him unopened and undelivered. In those circumstances was the Act complied with? Did the clerk of the peace "in due course give "notice" to Mr. Rossi? It is argued that it is sufficient to comply with section 3 (1) if he sends a registered letter to the respondent, even though it is not received by him, and known not to be received. I do not think this is correct. When construing this section, it is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes any order against him. In the old days the common law went so far as to compel the defendant to appear in person in court. It did this by a writ of capias directing the sheriff "to take the body of the defendant . . . and him safely to "keep, so that he may have him in court on the day of the "return, to answer to the plaintiff": see Blackstone's Commentaries III, 282. That has all been done away with, but the law still insists in most cases that the defendant shall be served personally so as to be sure that he knows of the proceedings against him. In modern times there have been a few statutes and rules which allow service by registered post, and this is one of them. The merit of registered post in this regard is that the postman will only deliver the letter to the person to whom it is addressed or to someone who will take responsibility for seeing that he gets it. Otherwise he will return it to the sender, who will thus get to know, sooner or later, if the letter is not received.

The next thing to remember when construing the section is that the notice under section 3 (1) (when given for the first date) fulfils a very important function. It is the first document issued by the court of quarter sessions to show that it is seized of the appeal. It is an originating process analogous to a writ of summons. It originates a new process against the respondent. He has already succeeded in the magistrates' court: and the appellant then wishes to bring him before a higher court, quarter sessions, for what is in truth and in fact a new hearing altogether. It is just as necessary that he should have fair notice of the hearing before quarter sessions as of the hearing before the magistrates. This is the function of the notice prescribed by section 3 (1). Due service of it is, therefore, an essential preliminary to the hearing of the appeal. Unless the respondent appears before quarter sessions and admits the notice, the appellant must prove due service or an acknowledgment from the respondent that it has been received. This is a preliminary step before the court will enter into the subject-matter of her complaint: compare Nolan on the Poor Laws (1825), II, pp. 531–532. If the case has been previously adjourned sine die, the appellant must prove due service of the notice for the second date just as for the first date.

In the present case, therefore, when the case was called on for hearing on September 28, 1954, and Mr. Rossi did not appear, it was essential for counsel for Mrs. Minors to prove service of the notice in accordance with section 3 (1) of the Act. He had to prove that the clerk of the peace had in due course given Mr. Rossi notice of the date, time and place of the hearing. This could be done by proof that a notice had been sent to him in good time by post in a registered letter which had not been returned, for it could then be assumed that it had been delivered in the ordinary course of post; see section 26 of the Interpretation Act, 1889. But once it appeared that the letter had been returned undelivered, then it was quite plain that he had not been given notice at all of the date, time and place of the hearing. In short, service had not been effected; and the court should not have entered upon the hearing at all.

At quarter sessions the suggestion was made by counsel for

Mrs. Minors that Mr. Rossi was evading service. I do not think that this suggestion was substantiated by the evidence. There was no reason why Mr. Rossi should seek to evade service. He had succeeded before the magistrate and would presumably wish to contest the case before quarter sessions, as he did before the magistrate. He had attended quarter sessions on the first day, August 13, 1954. Why should he seek to avoid attending on the second day, September 28, if he knew of it? All the evidence was quite consistent with the view that he was away from his home on September 22, 1954, when the postman called. There was no evidence whatever that he knew of the second date for the hearing. In any case, even if he was evading service, it does not help Mrs. Minors. Evading service would be a ground for ordering personal service or substituted service, but not for dispensing with service altogether.

In my opinion, therefore, once it appeared that the registered letter was returned undelivered, quarter sessions ought not to have proceeded with the case, because there was no proper service. The order made by quarter sessions was obtained irregularly and should be set aside. Certiorari should issue to bring up the proceedings to be quashed.

I would just add this: if the order had been *regularly* obtained (as the Divisional Court thought), then I would agree that there would be no ground for certiorari; and the only remedy of Mr. Rossi would be by application to quarter sessions to set aside the order made in his absence and to rehear the appeal. It was suggested before us that the court of quarter sessions had no power to set aside its own orders, even when made in the absence of the respondent; but, on looking into the matter, I am satisfied that it has, and that the intimation of the Lord Chief Justice on this point is well founded. Suppose, for instance, that Mr. Rossi had received proper notice of the date of the hearing, but failed to attend because he was ill; and the court, not knowing of it, heard the appeal in his absence and decided against him. Or suppose that the registered letter had not been returned undelivered, so that the court were entitled to assume that it had been delivered in the ordinary course of post. In each of those cases the order of quarter sessions would be *regularly* obtained: but Mr. Rossi would be able to have it set aside on such terms as the court thought fit and he could be let in to defend on the merits. That was done over 250 years ago in the days of Queen Anne, when Holt C.J. was clearly of opinion that quarter sessions had just the same power as the Queen's

Bench to set aside a judgment or order made in the absence of a party: see *St. Andrews Inhabitants, Holborn* v. *St. Clement Danes*[1] (compare *Reg.* v. *May*[2]); and so have inferior courts generally: see *Street's Case*[3] and *Rex* v. *Peters.*[4] At one time the application to set aside had to be made during the same sessions, but that is no longer the case. Delay is a ground on which the court may in its discretion refuse relief, but it is not an absolute bar. On the other hand, if the case has been heard on its merits with both sides present, quarter sessions have, of course, no power to set aside their own orders: see *Pridgeon's Case*[5] and *Reg.* v. *Glynne.*[6]

I may add that, where an order has been obtained *irregularly* without proper service, the quarter sessions can themselves set it aside: see *Bayly* v. *Boorne*[7] and *Jewell* v. *Hill*[8]; but so can the Queen's Bench by certiorari.

To sum up, when service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular. It will not as a rule be set aside except on payment of costs and showing of merits: see *T. O. Supplies (London) Ltd.* v. *Jerry Creighton Ltd.*[9] But if the letter is returned undelivered and nevertheless, notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be set aside ex debito justitiae. The order of quarter sessions here was irregular because there was no proper service and it should be set aside. I would allow the appeal accordingly.

MORRIS L.J. stated the facts, and continued: In my judgment the result of granting the adjournment "sine die" was that it became necessary to fix afresh the date for the hearing of the appeal. There was no question of an adjournment to some specified later date; there was a general adjournment without any day being fixed. There was then no longer any date fixed for the hearing. But at some later time a new date was fixed. The new date was September 28, 1954. In the circumstances it became necessary for the clerk of the peace to give notices as to the date, time and place fixed. This the clerk of the peace proceeded to do. [His Lordship stated the further facts, and continued:] The issue which now arises is whether there are grounds for an order of certiorari. I respectfully agree with what Lord Goddard C.J. said in his judgment: "It has been pointed "out over and over again that certiorari is a very special remedy. "People cannot get certiorari merely as a matter of appeal. It "is not a matter of appeal. If they can show that some requisite "imposed by law has not been fulfilled, it would be a ground for "asking this court to quash the proceedings on the ground that "quarter sessions had no jurisdiction to hear the case." It now appears that there is a point as to whether a requisite imposed by law has been fulfilled. The point is whether Mr. Rossi was given notice of the hearing in accordance with a statutory requirement. When this matter was before the Divisional Court the transcript of what had been said in court to the appeals committee on August 13, 1954, was for some reason not available. It is only fair that this should be stated. Now that it is available it shows that what happened on August 13 was not that the appeal did not come on because earlier cases had taken longer than anticipated and that Mr. Rossi "was informed that the "case would not be taken that day but would be taken on the "next appeal day at the end of September," as the Divisional Court thought, but that an application for an indefinite adjournment was made on behalf of Mrs. Minors because of her difficulties about witnesses. It appears that there was an adjournment "sine die." It must be recognized that Mrs. Minors' evidence on September 28, given in the absence of Mr. Rossi, that "he was told the case would come up at the end of "September" is capable of the meaning that after the application on August 13 was granted, somebody then arranged that the case would be taken at the end of September and so informed Mr. Rossi. A reading of the transcript of what was said on August 13 suggests that this is not a probability. Mr. Rossi has denied in his affidavit that he was told: a statement about "the "end of September" is hardly a notification of a date; while it is seen that what the clerk of the peace later proceeded to do, and, as I think, very properly proceeded to do, was to endeavour to notify Mr. Rossi of the new date. There had been, as Mr. Simon put to us, an "unfixing" of the date of hearing. The assigned date had been vacated. There then arose afresh the statutory obligation imposed by section 3 (as amended) of the Summary Jurisdiction (Appeals) Act, 1933. The clerk of the peace did what he could, but the question arises whether Mr.

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[1] (1704) 2 Salk. 605.
[2] (1880) 5 Q.B.D. 382.
[3] 7 Vin.Abr. 24, para. 10.
[4] (1758) 1 Burr. 568.
[5] (1633) 4 Cro.Car. 341, 350.
[6] (1871) L.R. 7 Q.B. 16.
[7] (1721) 1 Strange 391.
[8] (1722) 1 Strange 498.
[9] [1952] 1 K.B. 42; [1951] 2 T.L.R. 42; [1951] 2 All E.R. 992.

Rossi was given notice. If he was not, then there was a defect in procedure of the kind referred to by the Lord Chief Justice.

The first words which have to be considered are as follows: "shall in due course give notice to . . . the other party to the "appeal . . . as to the date, time and place fixed for the hearing "of the appeal." There is an obligation to "give" such notice. The purpose of giving notice to a party of the hearing of a case is so that the party may have the opportunity to appear in order to assert or to defend his rights. It seems to me, therefore, that it is of the very essence of such notice that it should be communicated to or should reach the party interested.

It is fundamental in our system of administration of justice that a party should have the right and opportunity to be heard or to be represented. This is well recognized. The procedure laid down in relation to adjournments of hearings at petty sessions may be cited as an illustration, though illustration is hardly needed. Section 46 of the Magistrates' Court Act, 1952, provides as follows: "(1) A magistrates' court may at any time, whether "before or after beginning to hear a complaint, adjourn the "hearing, and may do so, notwithstanding anything in this Act, "when composed of a single justice. (2) The court may when "adjourning either fix the time and place at which the hearing "is to be resumed or, unless it remands the defendant under the "next following section, leave the time and place to be determined later by the court; but the hearing shall not be resumed "at that time and place unless the court is satisfied that the "parties have had adequate notice thereof."

A general statement of principle may be found in Broom's Legal Maxims, 10th ed., at pp. 65, 66: "It has long been a "received rule, that no one is to be condemned, punished, or "deprived of his property in any judicial proceeding, unless he "has had an opportunity of being heard." Here is but an echo of the question of Nicodemus: "Doth our law judge "any man before it hear him and know what he doeth?"

We were referred to a number of statutory provisions relating to the serving or sending of various kinds of notices in various circumstances and to certain decisions relating to these provisions. Though it was proper and helpful to be referred to such provisions and decisions, the present case must depend upon the interpretation of this particular section of this particular Act.

The normal and convenient method of giving notice will doubtless be by way of a written or documentary notice: certainty of communication as to date and time and place may best be secured if the intimation is recorded in a document. Such document could be given to the party interested. But a usual and convenient method of transmitting the document is by employing the machinery of the post office. This is recognized and permitted by the legislature, for the subsection proceeds by enacting that: "A notice required by this subsection to be given "to any person may be sent by post in a registered letter "addressed to him at his last or usual place of abode."

Section 26 of the Interpretation Act, 1889, provides as follows: "Where an Act passed after the commencement of this "Act authorizes or requires any document to be served by post, "whether the expression 'serve,' or the expression 'give' or "'send,' or any other expression is used, then, unless the "contrary intention appears, the service shall be deemed to be "effected by properly addressing, prepaying, and posting a letter "containing the document, and unless the contrary is proved to "have been effected at the time at which the letter would be "delivered in the ordinary course of post."

The Act of 1933 clearly permits or authorizes the giving of a notice as to a hearing by sending a document by registered post. But if the primary obligation of giving notice means in this context the giving of some form of notice which reaches the party interested so that he may be present or represented at a hearing, then the permissive user of the post denotes a user so that notice may reach the party interested so that he may be present or represented at the hearing. It was therefore entirely proper to send a notice to Mr. Rossi by registered post. Applying the provisions of section 26 of the Interpretation Act, since no contrary intention appears from the Act of 1933, the sending of the notice to Mr. Rossi was deemed to be effected by properly addressing, prepaying and posting the letter which contained the document. Then by the concluding words of section 26, the sending of the notice was deemed, unless the contrary was proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post. But here the contrary was proved. It was proved, not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all. Service cannot in this case be deemed "to have been effected" at some particular time, i.e., in the ordinary course of post: service was proved not to have been effected at all. When considering the giving of a notice of a hearing of an appeal the element of time is clearly of importance: the notice must be given at such time as will enable a party to be present at a hearing. Here it was not.

The primary obligation imposed by section 3 is to "give "notice": in this context that denotes informing the parties interested: one permissive way in which that may be achieved is by sending a registered letter: normally that permissive way succeeds, and it is provided by rule 55 (2) of the Magistrates' Courts Rules, 1952, that the service of a document required or authorized to be served, the proper addressing, prepaying and posting or registration for the purposes of service of a letter containing such a document and the place, date and time of posting or registration of any such letter, may be proved by a document purporting to be a certificate signed by the person by whom the service was effected or the letter posted or registered. But by the operation of the Interpretation Act on the uncontested facts in this case it is shown that the procedurally correct permissive method by which it was sought to inform Mr. Rossi that the hearing of the appeal would be on September 28 did not achieve its purpose: the attempt to give notice by post failed: it was shown not to have been effected that way. Though a letter was sent it did not arrive. "A notice" was sent, but Mr. Rossi was not given notice. The result was that it appeared that notice had not been given to Mr. Rossi. Even if the appeals committee had felt disposed to accept the somewhat vague testimony of Mrs. Minors given on September 28 that "he "[i.e., Mr. Rossi] was told the case would come up at the end "of September," that could hardly prove that Mr. Rossi was given notice of "the date . . . fixed for the hearing of the "appeal."

As it was and is shown that notice was not given to Mr. Rossi in accordance with section 3 of the Act of 1933, it follows that a requisite imposed by law was not fulfilled and the appeals committee were not entitled to proceed to hear the appeal. It was not a matter for them within their discretion to decide. They could not overlook a failure to satisfy a statutory requirement. I think, therefore, that there should be an order of certiorari.

PARKER L.J. I have come to the same conclusion. The sole question—though not an easy one—is whether the provisions of section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, were complied with. If they were not, then the appeals committee had no jurisdiction to hear the appeal, and certiorari would lie. If, on the other hand, they were complied with, the committee had jurisdiction, and it was a matter for its discretion to hear the appeal forthwith, or to adjourn the case to give the present appellant an opportunity of being heard. With such an exercise of discretion this court could not interfere, certiorari not being a remedy by way of appeal.

Section 3 (1) of the Act, as amended by the Criminal Justice Act, 1948, and the Magistrates' Courts Act, 1952, now reads as follows: [His Lordship read the subsection and continued:] The date originally fixed for the hearing was August 13, 1954, and there is no doubt that notice of this was given to the appellant. He in fact attended the court that day. According to the transcript, an application was then made by counsel for Mrs. Minors that the case should be adjourned sine die, and this was granted. The appellant, however, does not appear to have been in court when this application was made. In these circumstances the first question which arises is whether a further notice must be given of the date later fixed for the adjourned hearing. Bearing in mind the fundamental principle of English law that a party should be given an opportunity of being heard, I see no reason for construing the subsection in the narrow sense that only a notice of the hearing originally fixed need be given. At any rate where, as here, the appeal was never opened and at the outset it was adjourned sine die, I think that the statute requires a further notice to be given. The granting of the adjournment amounts to the unfixing of the date originally fixed, and contemplates that a new date will be fixed. Indeed, it is to be observed that the clerk of the peace did in fact attempt to cause a notice of the hearing for September 28 to be received by the appellant.

The next question, accordingly, is whether such a notice was given. The Divisional Court apparently understood that the case was not reached on August 13, and that the appellant, being present, was then orally informed that the case would be taken on the next appeal day at the end of September. This was no doubt based at any rate partly on the fact that Mrs. Minors before the appeals committee had stated that he was told that the case would come up at the end of September. It is to be observed, however, that she did not state who had told him, nor did she state that he had been informed as to any specific date or time. Unfortunately, the transcript of the proceedings on August 13 was not before the Divisional Court. This clearly shows that, as I have stated, an application for an adjournment sine die was made and granted in the absence of the appellant, and at any rate partly in the interests of Mrs. Minors. In the light of this, it seems to me that the appellant's statement in his affidavit is the more probable, namely, that he was told that the case would not be heard that day, and that he was not told when it would be heard. Accordingly, I do not think that there was an oral compliance with the section.

The matter does not, however, end there, since the clerk of the peace in fact sent by registered letter to the appellant at his last place of abode a notice of the hearing for September 28, mentioning the time and place. Though the posting of the letter was not strictly proved, it was produced to the chairman of the appeals committee, having been returned undelivered to the clerk of the peace. It was produced to us. It was apparently sent on September 21, and was returned marked "no response" as on September 22. Whether the dispatch of this letter, though undelivered, constituted the giving of a notice depends on the true construction of section 3 (1) read with section 26 of the Interpretation Act, 1889. The latter section—to which the Divisional Court were not referred—is in these terms:—[His Lordship read the section and continued:] The section, it will be seen, is in two parts. The first part provides that the dispatch of a notice or other document in the manner laid down, shall be deemed to be service thereof. The second part provides that unless the contrary is proved that service is effected on the day when in the ordinary course of post the document would be delivered. This second part, therefore, concerning delivery as it does, comes into play and only comes into play in a case where under the legislation to which the section is being applied the document has to be received by a certain time. If in such a case "the contrary is proved," that is, that the document was not received by that time or at all, then the position appears to be that though under the first part of the section the document is deemed to have been served, it has been proved that it was not served in time.

Accordingly, the question is whether section 3 (1) of the Act of 1933 on its true construction provides that notice must be given within a certain time and whether that time relates to receipt or merely to dispatch of the notice. Notice is to be given "in due course," and in its context this must mean that it is to be given within a reasonable time after the hearing is fixed. But does this reasonable time apply to the receipt of the notice or merely to the dispatch of the notice? As to this we were referred to a number of cases which show that the line of demarcation between the two categories is often a fine one. Each case must depend upon the exact words used in the legislation in question, and upon the object with which the document is sent. As Ridley J. said in *Retail Dairy Co. Ltd.* v. *Clarke*[10]: "Sending "in the ordinary sense is merely dispatching. The word 'send' "may, however, be used in connexion with other words so as "to imply that by 'sending' is meant such a sending as that "the thing may by the time specified pass into the hands of the "person to whom it was sent. If section 20, subsection (1), of the "Sale of Food and Drugs Act, 1899, had contained words to that "effect it would be necessary to follow the decisions in *Browne* v. "*Black*[11] and *Reg.* v. *Inhabitants of Slawstone*.[12] But there "are no such words in this section; nor is there any need for "them, for no period is fixed by the Act of 1899 as being that "which must elapse after the receipt of the document before "the recipient can take such steps as may be necessary in "consequence of its reception."

In that case the court held that there was nothing in section 20 (1) of the Sale of Food and Drugs Act, 1899, providing for the sending of a warranty or invoice by the defendant to the purchaser, which required the word "send" to be construed other than in its ordinary meaning of "dispatched." Again, in the cases under section 21 of the Road Traffic Act, 1930, which requires that within 14 days a notice of intended prosecution is to be "served on or sent by registered post" to the offender, it has been held that "sent" merely means dispatched: compare *Stanley* v. *Thomas*,[13] *Holt* v. *Dyson*[14] and *Sandland* v. *Neale*.[15] On the other hand, in *Reg.* v. *Recorder of Richmond*,[16] the court construed "sent" in its context as meaning "delivered."

Turning again to section 3 (1) of the Act of 1933, the clerk of the peace is to "give notice," which contemplates not merely a written notice but an oral notice, and if the matter rested there I think it is reasonably clear that the notice is to be delivered, and delivered in time to enable the party concerned to prepare for and attend the hearing. Much reliance is, however, placed on the concluding sentence which provides for

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[10] [1912] 2 K.B. 388, 393; 28 T.L.R. 361.

[11] [1912] 1 K.B. 316; 28 T.L.R. 119.

[12] (1852) 18 Q.B. 388.

[13] [1939] 2 K.B. 462; 55 T.L.R. 711; [1939] 2 All E.R. 636.

[14] [1951] 1 K.B. 364; 66 T.L.R. (Pt. 2) 1009; [1950] 2 All E.R. 840.

[15] [1956] 1 Q.B. 241; [1955] 3 All E.R. 571.

[16] (1858) 27 L.J.M.C. 197.

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REGINA v. COUNTY OF LONDON QUARTER SESSIONS APPEALS COMMITTEE. *Ex parte* ROSSI.

Parker L.J.

the notice being "sent." That, however, is only providing a further method by which the clerk of the peace may "give "notice" and cannot alter the nature of the obligation itself. Further, it is, I think, important to appreciate the object of the notice. The appeal to the appeals committee is in every sense a rehearing. It is for the complainant who has lost her case below to begin, and to call her evidence afresh. The respondent to the appeal, who has won below, ought, one would think, to be put into a position to appear and resist the case on the rehearing if he so desires. So far as the original hearing before petty sessions is concerned, there is an elaborate code laid down to ensure that the party against whom the complaint is made should have a full opportunity of appearing: compare sections 45, 46 and 47 of the Magistrates' Courts Act, 1952. It would be odd if section 3 (1) of the Act of 1933 had to be construed so as to put him in a less favourable position in an appeal. I think that the obligation expressed by the words "shall in due course give notice" means in its context "shall cause notice to be received "in a reasonable time to enable the party concerned to prepare "for and attend the hearing."

*Appeal allowed.*
*Leave to appeal to House of Lords refused.*

Solicitors: *Good, Good & Co.; Samuel Dalton.*

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*Jan.* 12, 13; 24.

Denning, Morris and Parker L.JJ.

## LAZARUS ESTATES LTD. *v.* BEASLEY.

[Plaint No. L.O. 847.]

*Landlord and Tenant—Rent restriction—Repairs and rent—Notice of increase and declaration as to repairs served on tenant—Declaration not challenged by tenant within* 28 *days—Whether tenant precluded after* 28 *days from challenging validity of declaration on ground of fraud—"Satisfactory evidence"—Particulars required in notice —Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 23 (1), 25; *Sch. II, paras.* 4, 5, 6.

*Signature — Company — Rubber stamp — Whether effective. Company. Practice—Notice—Misnomer in—Housing Repairs and Rents Act,* 1954, *Sch. II.*

*Fraud—Party cannot rely on own fraud—Notice—Alleged fraudulent statement in—Validity—Housing Repairs and Rents Act,* 1954, *Sch. II.*

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LAZARUS ESTATES LTD. v. BEASLEY.

A tenant was served with a notice of increase of rent under the Housing Repairs and Rents Act, 1954,[1] together with a declaration purporting to comply with the provisions of the Act, declaring that work of repair to the value of £566 had been carried out in the specified period. The tenant did not challenge the declared value of the repairs in the county court under paragraph 4 of the Second Schedule within 28 days of receiving the notice, but did not pay the increase of rent. The landlords sued her in the county court for the arrears, and by her defence the tenant alleged, inter alia, that the declaration was fraudulent in that, as to £300 of the £566, no such work of repair had been carried out. The county court judge gave judgment for the landlords, holding that after the expiry of the 28-day period he was precluded from hearing evidence as to the alleged fraud by the terms of paragraph 5 of the Second Schedule. On appeal by the tenant:—

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[1] Housing Repairs and Rents Act, 1954, s. 23: "(1) Where a dwelling-"house is let under a controlled "tenancy or occupied by a statutory "tenant, and the landlord is respon-"sible, wholly or in part, for the "repair of the dwelling-house, then, "subject to the provisions of this Part "of this Act,—(*a*) if and so long as "the following conditions (hereinafter "referred to as 'the conditions justi-"'fying an increase of rent') are "fulfilled, that is to say—(i) that the "dwelling-house is in good repair; "and (ii) that it is reasonably suitable "for occupation having regard to the "matters specified in paragraphs (*b*) "to (*h*) of section 9 (1) of this Act; "and (*b*) if in accordance with the "Second Schedule to this Act the "landlord has produced satisfactory "evidence that work of repair to the "value specified in that Schedule has "been carried out on the dwelling-"house during the period so specified, "the rent recoverable from the tenant "shall be increased by virtue of this "subsection so as to exceed by the "amount hereinafter mentioned the "rent which apart from this sub-"section would be recoverable from "the tenant under the terms of the "tenancy or statutory tenancy and "having regard to the provisions of "any enactment."

Sch. II, para. 4: "(1) Within "twenty-eight days after the relevant "date the tenant may apply to the "county court to determine whether "work of repair has been carried out "on the dwelling-house during the "period specified in the declaration to "a value not less than that so specified "and whether that value is at least "the value required by the foregoing "provisions of this Schedule; and if "on such an application the court is "not satisfied that work of repair has "been carried out as aforesaid and "that the value specified in the decla-"ration is at least the value required "as aforesaid, the court shall certify "accordingly and thereupon the notice "of increase shall be, and be deemed "always to have been, of no effect. ". . ."

Para. 5: "Subject to the provisions "of the last foregoing paragraph, the "service with a notice of increase of "such a declaration as is required by "this Schedule shall be treated for the "purposes of section 23 (1) of this "Act as the production of satisfactory "evidence that work has been carried "out as mentioned in paragraph (*b*) "of that subsection; and subject as "aforesaid the validity of a declara-"tion shall not be questioned on the "ground that the value of the work "of repair stated in the declaration "to have been carried out on the "dwelling-house is less than that re-"quired by the foregoing provisions "of this Schedule."

Para. 6: "If in such a declaration "any person makes a statement which "he knows to be false in a material "particular or recklessly makes a "statement which is false in a "material particular he shall be liable "on summary conviction to a fine not "exceeding thirty pounds."

*Held* (Morris L.J. dissenting), that the terms of paragraph 5 did not exclude the tenant, when sued for the increase of rent, from claiming that the declaration was not "satisfactory "evidence" for the purposes of section 23 (1), on the ground that it was fraudulent.

The provisions of the Act entitle a tenant to challenge the validity of a declaration on grounds other than those set out in paragraph 4; and the time to raise such challenges to validity is not that provided under paragraph 4, but when sued for the increase of rent. The present tenant, by challenging the declaration on the ground that it was fraudulent, was challenging its validity on grounds other than that repairs had not been done to the value specified therein, for fraud vitiates all transactions known to the law, and the landlords could not recover increased rent by reason of their fraud.

*Per* Morris L.J. dissenting. If the tenant does not put his landlord to proof in the county court within 28 days of the service of notice and declaration, he cannot challenge them thereafter and must pay the increased rent, for the language of the Act is compelling; Parliament has imposed a time limit and has not made exceptions to cover special cases.

*Woollett* v. *Minister of Agriculture and Fisheries* [1955] 1 Q.B. 103; [1954] 3 All E.R. 529, C.A.; reversing [1954] 1 W.L.R. 1149; [1954] 2 All E.R. 776 and *Smith* v. *East Elloe Rural District Council* [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19 distinguished.

Although the documents were not addressed to the tenant in her correct name, but bore the wrongly spelt name of her deceased husband, the misnomer did not invalidate them, since they were addressed to "the tenant" and she was not misled in any way.

*Per* Denning L.J. It has not yet been held, when there is nothing to indicate who affixed the rubber stamp, that a company can sign documents by its printed name affixed with a rubber stamp.

Appeal from Judge Clothier, sitting at Lambeth County Court.

In October, 1954, Lazarus Estates Ltd., the landlords of a block of flats, The Palatinate, New Kent Road, served on Mrs. Violet Beasley, the statutory tenant of flat No. 13, three documents, each dated October 9, 1954, purporting to be documents in the forms prescribed by the Housing Repairs and Rents Act, 1954,[1] for the purpose of increasing the rent of the flat from 18s. 8d. to £1 2s. 9d. a week. The first document was a notice of election under section 30 (3) of the Act of 1954 by which the landlords disclaimed any responsibility for keeping the interior of the premises in good decorative repair. The second was a declaration (i) that the conditions justifying an increase of rent were fulfilled (namely, that the premises were in good repair and reasonably fit for occupation) and (ii) that the landlords had done work of repair so as to qualify them for an increase. The declaration contained the following: "During the period of three years "ending on the 30th day of September, 1953, being a period "falling within the four years ending with the date of service "of the notice of increase, work of repair of the general description specified in the Schedule to this declaration has been "carried out on the building comprising the premises or solely "for the benefit of the premises or of other dwelling-houses "comprised in the building to the value of £566 6s. 2d. being a "value not less than four times the aggregate of the amounts of "the statutory repairs deductions for all the dwelling-houses "comprised in the building, namely, £324." In the Schedule it was shown that the £566 6s. 2d. was made up by "External "decorative repairs, £266 6s. 2d." and "Other repairs wholly "for the benefit of the dwelling-houses comprised in the building, £300." The third document was a notice of repairs increase by which the landlords stated that the existing rent of 18s. 8d. per week would be increased by 4s. 1d. per week as from November 20, 1954. The documents were not signed by the landlords or any person on behalf of the company, but were stamped with a rubber stamp "Lazarus Estates Ltd." They were addressed to "Mr. E. G. Brasley, tenant of 13, The "Palatinate, S.E.1," though Mrs. Violet Beasley had become the statutory tenant of the flat on the death of her husband, Mr. E. C. Beasley, two years previously.

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[1] For note see p. 703.

The tenant did not apply within 28 days of receiving the notice to challenge the figures in the landlords' declaration under the provisions of paragraph 4 of the Second Schedule to the Act of 1954 [1]; but she obtained from the local authority a certificate of disrepair which she served on the landlords on February 1, 1955. She continued to pay the old rent, but did not pay the increase claimed by the landlords. Accordingly, on March 28, 1955, the landlords brought an action against her in the Lambeth County Court, claiming arrears of rent of £2 4s. 11d., being the amount of the increase of rent for 11 weeks. By her defence as amended, the tenant denied that any rent was in arrear; claimed that there had been no valid increase of rent; admitted that a document purporting to be a notice of increase came into her possession, but stated that it was addressed to "Mr. E. G. "Brasley," and that the date specified in it on which the increased rent was to become effective was less than six clear weeks after the service of the notice. She alleged further that the declaration accompanying the notice represented that "other "works wholly for the benefit of the dwelling-house comprised "in the building" had been carried out to the value of £300, whereas in fact no such works had been carried out during the period specified; and that the notice was therefore not valid since the declaration was false and fraudulent to the knowledge of the landlords or their servants or agents.

At the hearing in the county court, the tenant sought to amend the pleadings by adding a counterclaim for damages for the alleged fraud. For the landlords it was contended that the terms of paragraph 5 of the Second Schedule [1] precluded the county court judge from hearing any evidence of fraud either by way of defence or by way of counterclaim after the expiry of the 28-day period provided by paragraph 4 of that Schedule. The county court judge upheld that contention, stating that he had no power to extend the time from 28 days; that it was not open to the tenant to take other action independently of the Act by bringing an action at common law for fraud in order indirectly to attack the landlords' declaration, since that was contrary to the scheme of the Act. Where an Act stated that something must be done within 28 days, there was no power in the court to extend the time by a sidewind by saying that what had been done had been done fraudulently. The object of the scheme was not to have a lot of litigation, and in a number of matters the Act indicated that the decision of the county court judge was to be final. He found that though the documents, which were served by post, were dated October 9, 1954, they had been posted on October 6, such that they would be delivered on October 7, thus giving the necessary six weeks' notice stipulated by the Act. He held that the notice, though incorrectly addressed, was valid and that the declaration could not be set aside; and gave judgment for the landlords for £2 4s. 11d.

The tenant appealed.

*R. Gavin Freeman* for the tenant. Though paragraph 5 of the Second Schedule to the Act plainly imposes a certain limitation on proceedings questioning the landlords' declaration after the 28 days have run, the paragraph is in guarded terms and provides that the declaration shall be "satisfactory evidence" for certain purposes only; it is certainly not in such clear terms as to prevent a litigant either raising a defence of fraud in answer to a claim for the increased rent by the landlords or, alternatively, claiming damages for fraud, whether by counterclaim or in an independent action, after the 28 days have run. The legislature cannot have intended landlords to be able to rely on a document founded on fraud, and the court will be slow to construe a statute in such a way as to exclude a defence alleging fraud; for the court has undoubted jurisdiction to relieve against every species of fraud. The ground for the submission that an independent action for damages for fraud is maintainable after the 28 days have run is even stronger, for if a landlord serves a declaration with the notice of repairs increase, and the tenant only discovers, say, six months later that the declaration is fraudulent because nothing has been spent on repairs, he would have no remedy and would have to pay the increased rent for the rest of time. The provision in paragraph 6 of the Second Schedule that the landlord may be fined £30 for fraud will not assist the tenant, who will be fixed with the increased rent by the terms of section 23 (1). In those circumstances the tenant must be able to bring an action for damages to recompense her for the increased rent which she has to pay under the terms of the Act.

It is conceded that the legislature has power to prevent certain types of litigation and that paragraph 5 was intended to exclude endless litigation over honest differences as to the amount spent on repairs, but it would require clearer words than those used in paragraph 5, or express terms, to exclude proceedings alleging fraud. The decisions in *Woollett* v. *Minister of Agriculture and Fisheries*[2] and *Smith* v. *East Elloe Rural District Council*,[3] that the words of paragraph 16 of the First Schedule to the Acquisition of Land (Authorization Procedure) Act, 1946, were intended to exclude all litigation after six weeks, are distinguishable, for there the language is clear; it is that after six weeks the certificate "shall not be questioned in any legal proceedings whatever." Moreover, the procedure under that Act is quite different; it is not a question there of an interested party serving a notice on the tenant and the tenant thereby losing his rights; on the contrary, there is a hearing before the agricultural committee appointed by the Minister before the certificate is granted, and many steps have to be taken before the certificate takes effect.

Secondly, it is submitted that the notice served on this tenant was invalid. At the material time she was the statutory tenant of these premises. The notice served on her was wrong as to sex, name and initial. Even if it were capable of being amended

[2] [1955] 1 Q.B. 103; [1954] 2 All E.R. 776.

[3] [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19.

by leave of the court, the amendment should be on terms that the 28 days should begin to run only from the date of the amendment. This is a difficult Act for tenants to understand, particularly if they live in a block of flats and do not know what has been done in the way of repairs on other parts of the building and must incur expense to find out. The period of challenge under paragraph 4 is very short, and if there is any possibility that through mistakes in the notice the tenant may not have had the full 28 days, the court should declare such notices invalid unless they are completely accurate in all details. The tenant can waive any objection if he wishes, but if he takes an objection, he ought to have a remedy.

*H. Heathcote-Williams Q.C.* and *George Dobry* for the landlords. The tenant has the opportunity given by paragraph 4 to question the landlords' declaration within 28 days, but once that period has run there is no power to extend it, and by the compelling words of section 23 (1) of the Act the rent " shall " be increased if the landlord produces " satisfactory evidence "; and " satisfactory evidence " is defined by paragraph 5. Thereafter, by operation of law, the landlords, having done all that the Act requires of them, become automatically entitled to the increased rent. It would be most burdensome to landlords if by a mere allegation of fraud the express provisions of the Act could be evaded.

[Morris L.J. If the first part of paragraph 5 means that the production of the declaration is " satisfactory evidence " and that is an end of the matter, what is the purpose of the second half of paragraph 5 as to " validity "? Is it said that " satisfactory " evidence " is irrebuttable evidence?]

Yes; it is conclusive if it has not been challenged within 28 days. The scheme of the Act is to provide procedure which, while protecting both parties, will avoid multiplicity of proceedings.

[Denning L.J. If a tenant is ill or away and misses the notice, surely the legislature cannot have intended that he should be fixed with the increased rent for ever?]

The legislature has imposed that limitation. Though it is conceded that the wording in the Schedule to the Act of 1946 which was considered in *Woollett's* case[4] and *Smith* v. *East Elloe Rural District Council*[5] is clearer, those decisions are relied on as showing that the legislature here intended to exclude proceedings after a certain period.

[4] [1955] 1 Q.B. 103.

[5] [1955] 1 W.L.R. 380.

[Denning L.J. The wording of the Act of 1946 is much stronger, and the compulsory acquisition of land is carried out by a very responsible Minister.]

[Parker L.J. I can understand that once the 28 days have run the declaration becomes "satisfactory evidence," for the purposes of section 23, that work to the value specified has been done. But there is nothing in the Act or the Schedule which excludes the tenant, if he refuses to pay the increased rent, from challenging the declaration on the ground of fraud.]

Nothing in section 23 excludes an independent action for fraud; but that section read with paragraph 5 makes the increase of rent automatic. The tenant has an alternative method of resisting the increase demanded, because if he has been served with a notice of repairs increase, and his premises are in bad repair, he can apply to the local authority for a certificate of disrepair, as this tenant did, and if he obtains it, he does not have to pay the increased rent until the house has been put into order as required by section 23. If the house is in good repair and the tenant has failed to challenge the declaration successfully within 28 days, there is no reason why he should not pay an increased rent. Further, the legislature has provided a penalty in paragraph 6 of the Second Schedule for the landlord who has been guilty of fraud.

The maxim that "fraud unravels all" does not extend to cases where Parliament has laid down that fraud cannot be unravelled after the lapse of a specified period. The landlord has a time limit under the Act too, for if the declaration is successfully challenged under paragraph 4, he cannot serve another notice of increase: see paragraphs 1 and 2 of the Second Schedule.

The decision in *Donegal Tweed Co.* v. *Stephenson*[6] under the Landlord and Tenant Act, 1927, is authority for the submission that the court has no inherent jurisdiction to extend a period for appeal laid down by Parliament.

*Freeman* in reply. The evidence, though "satisfactory" for one purpose, may be vitiated by fraud. It is correct that if a certificate of disrepair is issued the tenant need not pay the increase. The increase is only permitted if the landlord has spent a certain sum of money on it within a certain period; and a tenant whose rent is increased other than under the provisions of the Act has very good cause to complain.

*Cur. adv. vult.*

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[6] (1929) 98 L.J.K.B. 657; [1929] W.N. 214.

Jan. 24. Denning L.J. stated the facts and continued: Two technical objections were taken to the validity of the documents. The first objection was that the documents did not give the correct name of the tenant. They were addressed to "Mr. E. G. Brasley, "tenant of 13, The Palatinate, S.E.1," whereas they should have been addressed to "Mrs. Violet Beasley." This misnomer was an obvious mistake which does not affect the validity of the documents. The documents were addressed to "the tenant," Mrs. Beasley knew that she was the tenant, and she was not misled in any way. Indeed, she admitted in her defence that she was served with the documents. In these circumstances she cannot complain of the misdescription.

The second objection was that the prescribed six weeks' notice was not given for the increase to operate. The documents were served by post. They bore date October 9, 1954, a Saturday. If they were posted on that day, they would not reach the tenant till October 11 (a Monday), and the increase was to operate from November 20, 1954 (a Saturday), and would thus be two days short of six weeks. The landlords' agent said, however, that the documents were posted on Wednesday, October 6, 1954, not the 9th, and his evidence was not challenged. If this is correct, the documents would be delivered on October 7, 1954, which would give the necessary six weeks. That objection therefore also failed.

No other objections were taken in the county court to the documents, but I do not wish it to be assumed that this court approves of them. The statutory forms require the documents to be "signed" by the landlord, but the only signature on these documents (if such it can be called) was a rubber stamp "Lazarus "Estates Ltd." without anything to verify it. There was no signature of a secretary or of any person at all on behalf of the company. There was nothing to indicate who affixed the rubber stamp. It has been held in this court that a private person can sign a document by impressing a rubber stamp with his own facsimile signature on it: see *Goodman* v. *J. Eban Ltd.*,[1] but it has not yet been held that a company can sign by its printed name affixed with a rubber stamp. Another point which is very material is that the declaration failed to specify any of the works of repair which had been done. The statutory form requires that a schedule to the declaration should contain a general description of the work done under each heading. The schedule in this case gave no such description. The headings "External

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[1] [1954] 1 Q.B. 550; [1954] 1 All E.R. 763.

"decorative repairs" and "Internal decorative repairs" were bracketed together and put at £266 6s. 2d. with nothing to say what was done. The heading "Other repairs wholly for the "benefit of dwelling-houses comprised in the building" was put at £300 without a word to say what those repairs were. The statutory form was, therefore, not complied with. No objection, however, was taken in the county court that the declaration was invalid on this ground. We cannot therefore go into it and must approach the case on the footing that that declaration in matters of form complied with the statutory requirements.

I turn, therefore, to the substance of the case. The tenant seeks to say that the declaration was false and fraudulent. She says that it was quite untrue for the landlords to say that they had spent £300 on "other repairs wholly for the benefit of "dwelling-houses comprised in the building." She alleges that no such works were carried out at all. The judge has held, however, that she cannot go into that matter at all. She had 28 days, he says, in which to do it after the notice was served. As she did not challenge the declaration within that time, he says that she cannot now challenge it at all. The tenant appeals to this court.

In order to justify an increase, the Act requires the landlord to produce "satisfactory evidence" that he has done work of repair to the required value during the appropriate period: see section 23 (1) (*b*); and he must produce it "in accordance with "the Second Schedule." Inasmuch as the tenant is the person who is to pay the increase, the landlord must, I think, produce the evidence to the tenant. Apart from the Second Schedule (which I will consider in a moment) the evidence, in order to be satisfactory, ought, I think, to be such as to satisfy the tenant that the required work has been done; or if he takes unreasonable objection to it, it ought to be such as would satisfy a reasonable tenant. I do not think that it would be satisfactory for the landlord to rely simply on his own word, uncorroborated and not on oath, as evidence that he had done the required work. The tenant could reasonably require the landlord to produce his contemporaneous records, builders' accounts, duly receipted, and so forth.

This brings me to the Second Schedule. This shows that the tenant can insist on satisfactory evidence, at any rate, if he acts within 28 days. Paragraph 4 provides that within 28 days the tenant can apply to the court to determine whether the required work of repair has been carried out. The landlord must then produce evidence to satisfy the county court that work of repair was done so as to justify the increase, and unless he does so the notice of increase will be of no effect. The county court would, I imagine, in most cases insist on the production of records, receipts, and so forth, before it was satisfied. Suppose, however, that the tenant lets the 28 days slip by without applying to the county court. That is what happened in this case. Mrs. Beasley did not apply within the 28 days. The Second Schedule by paragraph 5 then provides that in that case the service of the declaration is itself to be treated as the production of satisfactory evidence that the work specified in it has been done. This means that the landlord can rely on his own word (as contained in the declaration) as satisfactory evidence, without supporting it with any records, receipts, or so forth. But does it mean that his word cannot be challenged at all, and that it is conclusive for all purposes? I do not think so. Paragraph 5 goes on to state one particular ground on which the declaration cannot be challenged, namely, that the value of the work stated in it was insufficient to justify the increase. That seems to import that it is open to the tenant to challenge the declaration on any other ground.

We are in this case concerned only with this point: can the declaration be challenged on the ground that it was false and fraudulent? It can clearly be challenged in the criminal courts. The landlord can be taken before the magistrate and fined £30: see Second Schedule (paragraph 6); or he can be prosecuted on indictment, and (if he is an individual) sent to prison: see section 5 of the Perjury Act, 1911. But the landlords argued before us that the declaration cannot be challenged in the civil courts at all even though it was false and fraudulent; and that the landlords can recover and keep the increased rent even though it was obtained by fraud. If this argument is correct, the landlords would profit greatly from their fraud. The increase in rent would pay the fine many times over. I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever: see as to deeds, *Collins*

v. *Blantern*[2]; as to judgments, *Duchess of Kingston's* case[3]; and as to contracts, *Master* v. *Miller*.[4] So here I am of opinion that if this declaration is proved to have been false and fraudulent, it is a nullity and void and the landlords cannot recover any increase of rent by virtue of it.

I would therefore allow this appeal and permit the tenant to raise the defence of fraud. I would just add this. We were told that 55 of the tenants in these blocks of flats applied within 28 days to the county court, and, although there was no hearing in court, the landlords have not insisted on the increase in those cases: but they seek to insist on the increase as against the other tenants who did not apply within 28 days. This failure on the part of the tenants may have been due to ignorance or mistake or some other reasonable excuse. The landlords say that, whatever the reason may be, once the 28 days have expired the tenants are without remedy, and that there is no power in the court to extend the time. It is easy to think of cases where strict insistence on the 28 days may work hardship and injustice to tenants. If it be correct that there is no power in the court to extend the time, the sooner the attention of the legislature is directed to it the better.

MORRIS L.J. A notice, which purported to be a notice in the prescribed form, of the intention of the landlords to increase the rent pursuant to the provisions of the Housing Repairs and Rents Act, 1954, was served on the tenant. The notice was addressed to "Mr. E. G. Brasley" as the tenant of No. 13, The Palatinate. The tenant was, however, Mrs. Violet Beasley. She had become the tenant after the death of her husband, Mr. E. C. Beasley, by the operation of section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The facts were fully known to her, and the fact that the notice referred to the "tenant" as being "Mr. E. G. Brasley," whereas she was the tenant as the successor to her late husband, did not in any way mislead her. She appreciated that a name had been wrongly inserted and wrongly spelt, and she must have understood that notice was being given to her as the tenant of No. 13, The Palatinate, that the rent was being increased. Accompanying the notice of increase were (*a*) a declaration that the conditions justifying an increase of rent were fulfilled, and (*b*) a declaration in the prescribed form such as is mentioned in the Second Schedule of the Housing Repairs and Rents Act, 1954. There was also a notice of election relating to internal decorative repairs made pursuant to section 30 (3) of the Housing Repairs and Rents Act, 1954.

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[2] (1767) 1 Smith's L.C., 13th ed., 406.

[3] (1776) 2 Smith's L.C., 13th ed., 644, 646, 651.

[4] (1791) 1 Smith's L.C., 13th ed., 780, 799.

Under the Second Schedule the " relevant date " is the date of service of the notice of increase accompanying the declaration mentioned in section 25 (1) (*b*) of the Act. It is provided by paragraph 4 of the Second Schedule as follows: " Within twenty-" eight days after the relevant date the tenant may apply to " the county court to determine whether work of repair has been " carried out on the dwelling-house during the period specified in " the declaration to a value not less than that so specified and " whether that value is at least the value required by the fore-" going provisions of this Schedule; and if on such an application " the court is not satisfied that work of repair has been carried " out as aforesaid and that the value specified in the declaration " is at least the value required as aforesaid, the court shall " certify accordingly and thereupon the notice of increase " shall be, and be deemed always to have been, of no effect. " (2) Where, on such an application as aforesaid, it is necessary " for the court to determine the extent to which the landlord " is or was responsible for the repair of the dwelling-house,— " (*a*) section 32 of this Act shall apply to that determination, and " (*b*) notwithstanding anything in section 23 (5) of this Act, the " determination shall have effect (so far as relevant) for the " purposes of that section." There may therefore, within 28 days, be an application to the county court (*a*) to determine whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified, and (*b*) to determine whether that value is at least the value required by the provisions in paragraphs 1 and 2 of the Schedule (as reduced in consequence of the service of the notice under section 30 (3)). If on such an application by the tenant the court is not satisfied both (*a*) that work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified, and also (*b*) that the value specified in the declaration is at least the value required by the provisions of paragraphs 1 and 2 of the Second Schedule, then the court must certify accordingly. The consequential result of so certifying is that the notice of increase is of no effect and is deemed always to have been of no effect.

In the present case the landlords elected (pursuant to paragraph 7 (3) of the Second Schedule) that the value of the work carried out on each of the dwellings contained in a building which is a block of flats should be determined by reference to the aggregate value of the work of repair carried out either on the building as a whole or so as to enure solely for the benefit of premises comprised in the building. The declaration of the landlords, which bore date October 9, 1954, contained the following: "During the period of three years ending on the 30th day of "September, 1953, being a period falling within the four years "ending with the date of service of the notice of increase, work "of repair of the general description specified in the schedule to "this declaration has been carried out on the building comprising "the premises or solely for the benefit of the premises or of "other dwelling-houses comprised in the building to the value of "£566 6s. 2d. being a value not less than four times the aggregate "of the amounts of the statutory repairs deductions for all the "dwelling-houses comprised in the building, namely, £324."

In the schedule it was shown that the £566 6s. 2d. was made up by "External decorative repairs, £266 6s. 2d.," and "Other "repairs wholly for the benefit of dwelling-houses comprised in "the building, £300." The way in which the value of the work carried out on a particular dwelling-house comprised in the block of flats was to be determined from these figures was the way laid down by paragraph 7 (3) (*b*) of the Second Schedule, which is in these terms: "the value of the work of repair carried out "during that period on any of the dwelling-houses comprised in "the building shall be taken to be an amount which bears to the "amount of the statutory repairs deduction for that dwelling-"house the same proportion as the aggregate value mentioned "in the last foregoing sub-paragraph bears to the aggregate of "the amounts of the statutory repairs deductions for all the "dwelling-houses comprised in the building."

When Mrs. Beasley received the declaration it was open to her, as the notes on the declaration stated, to make application within 28 days to the county court. She could have challenged the assertion that work of repair had been carried out on the building comprising the premises or solely for the benefit of the premises or of other dwelling-houses comprised in the building. She could have challenged that the work was carried out during the period specified. She could have challenged that the value of the work was £566 6s. 2d. She could have challenged that the sum of £324 was four times the aggregate of the amounts of the statutory repairs deductions for all the dwelling-houses comprised in the building.

Where there has been service of a notice of increase and of a declaration in the form prescribed in the Second Schedule the provisions of paragraph 5 of the Second Schedule become applicable. They are as follows: "Subject to the provisions of the "last foregoing paragraph, the service with a notice of increase "of such a declaration as is required by this Schedule shall be "treated for the purposes of subsection (1) of section twenty-"three of this Act as the production of satisfactory evidence "that work has been carried out as mentioned in paragraph (*b*) "of that subsection; and subject as aforesaid the validity of a "declaration shall not be questioned on the ground that the "value of the work of repair stated in the declaration to have "been carried out on the dwelling-house is less than that "required by the foregoing provisions of this Schedule." Where, therefore, there has been service with a notice of increase of a declaration as required by the Second Schedule, and where there has been no application to the county court by the tenant within 28 days which has made the notice of increase to be of no effect, two consequences follow:—(1) such service shall be treated for the purposes of subsection (1) of section 23 as the production of satisfactory evidence that work has been carried out as mentioned in paragraph (*b*) of that subsection; and (2) the validity of the declaration is not to be questioned on the ground that the value of the work of repair stated in the declaration is less than is made requisite by the Schedule.

In order to see the effect of these provisions reference must be made to section 23 (1) and to section 25 (1). Section 23 (1) is as follows: "Where a dwelling-house is let under "a controlled tenancy or occupied by a statutory tenant, and "the landlord is responsible, wholly or in part, for the repair of "the dwelling-house, then, subject to the provisions of this Part "of this Act,—(*a*) if and so long as the following conditions "(hereinafter referred to as 'the conditions justifying an "'increase of rent') are fulfilled, that is to say (i) that the "dwelling-house is in good repair; and (ii) that it is reasonably "suitable for occupation having regard to the matters specified "in paragraphs (*b*) to (*h*) of subsection (1) of section nine of "this Act; and (*b*) if in accordance with the Second Schedule to "this Act the landlord has produced satisfactory evidence that "work of repair to the value specified in that Schedule has "been carried out on the dwelling-house during the period so

" specified, the rent recoverable from the tenant shall be increased " by virtue of this subsection so as to exceed by the amount " hereinafter mentioned the rent which apart from this subsection would be recoverable from the tenant under the terms " of the tenancy or statutory tenancy and having regard to the " provisions of any enactment." Section 25 (1) provides: " No " sum shall be recoverable by way of repairs increase unless the " landlord has served on the tenant or a former tenant of the " dwelling-house a notice in the prescribed form of his intention " to increase the rent (hereinafter referred to as a 'notice of " 'increase'), accompanied by—(*a*) a declaration in the prescribed form that at the date of service of the notice the conditions justifying an increase of rent were fulfilled; and (*b*) a " declaration in the prescribed form such as is mentioned in the " Second Schedule to this Act; and no such sum shall be recoverable before, or in respect of any period before, such date as " may be specified in the notice."

In the present case there was a service of a notice of increase. It was accompanied by two declarations purporting to comply respectively with (*a*) and (*b*) of section 25 (1). No question has been raised as to the adequacy and correctness of the declaration that at the date of service of the notice the conditions justifying an increase of rent were fulfilled. Neither has it been questioned that there was a declaration in the prescribed form as required by the Second Schedule. It is possible that it might have been. It may be that the sufficiency of the general description of the work of repair could have been challenged in the action. It may be that the sufficiency as a signature of having the mere name of a limited company imposed by a rubber stamp might have been challenged in the action. But as these questions were not raised I express no opinion in regard to them. The only objection that was raised in regard to the form of the notice of increase and the declarations was that which I have mentioned, namely, that the name of Mrs. Beasley's late husband, misspelt, was on the notice. That objection I consider in the circumstances to be insubstantial and not to invalidate. A point was raised in the action (under section 25 (2) of the Act) that the date specified in the notice of increase was earlier than six weeks after the service of the notice: but the finding of fact of the judge as to the date of service disposed of this point.

There being no availing point as to the service of the notice and declarations, and no availing point as to the form of the notice and declarations, and there having been no application to the county court within paragraph 4 of the Second Schedule, the result is that "satisfactory evidence" was produced that work of repair to the value specified in the Second Schedule was carried out on the dwelling-house during the specified period. The phrase "satisfactory evidence" is one that by itself might merely denote admissible evidence from which a conclusion might be drawn but which might be rebutted or out-balanced by some other evidence. But section 23 (1) lays it down that on the production of the "satisfactory evidence" stipulated the result is to be that "the rent recoverable from the tenant shall "be increased." The wording is compelling, just as is the wording of paragraph 5 of the Second Schedule which provides that, unless the procedure of paragraph 4 is put into operation successfully, the service with the notice of increase of a declaration as required "shall" be treated as the production of "satisfactory evidence."

The wording of the second part of paragraph 5 is complementary to that in the first part; and both follow the provisions of paragraph 4. As I have mentioned, paragraph 4 provides for an application to the county court on two matters. The first is as to whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified. The first part of paragraph 5 then deals with the position when there has been no application. The position is that the service with the notice of increase of a declaration as required "shall be treated for the purposes of "section 23 (1) of this Act as the production of satisfactory "evidence that work has been carried out as mentioned in "paragraph (*b*) of that subsection." The other matter that may be the subject of an application to the county court under paragraph 4 is as to whether the value of the work carried out is at least the value required by the provisions in paragraphs 1 and 2 of the Schedule. The second part of paragraph 5 deals with the position where there has been no such application, and the provision is that "the validity of a declaration shall not be "questioned on the ground that the value of the work of repair "stated in the declaration to have been carried out on the "dwelling-house is less than that required by the foregoing "provisions of this Schedule."

In the present case Mrs. Beasley, by her defence, does not assert that no work of repair was done; she says that the sum of £566 is wrong: she does not challenge one of the two items which compose that figure, the item of £266, but she challenges the other, the item of £300. She asserts that the work which that figure is said to represent was never done, and she further asserts that the landlords knew this and fraudulently presented a figure and an item for which they knew there was no warrant at all. Accordingly, she asserts that the notice of increase was not valid because the declaration was false and fraudulent. But Mrs. Beasley's remedy was to have applied to the county court within 28 days of the service of the documents upon her. If she had the pithy case that one out of two items of suggested work was not only erroneous but was erroneous for the reason that the item had never existed and had been fraudulently invented, her task might have been simpler than that ordinarily undertaken by tenants. But whether she would have had an easy task or not, it seems to me that it is just as much too late for her now to attack one figure in the declaration, even though she alleges that the figure was fraudulently inserted, as it would be for her to attack a figure on the ground that it was excessive or was erroneously or mistakenly or carelessly overstated. The matter depends entirely, in my judgment, upon the language of the Act. There was a declaration which in form is not impeached. It cannot, in my view, be said that the declaration is a nullity because one part of its content is assailed. What is said is that one of two items was fraudulently added, and that without the tainted item the remaining figure would be insufficient. But by statute the service of the declaration must, unless the tenant avails himself of his statutory opportunities of putting his landlord to proof, be treated as the production of satisfactory evidence: the words are "shall be treated." Upon such production of satisfactory evidence the rent recoverable from the tenant "shall" be increased. The language appears to me to be compelling. No reason has been given why Mrs. Beasley did not make application to the county court within the prescribed time, and there is no suggestion that she could not have done so, or could not have made any inquiry that she wished. It seems to me that Parliament has imposed a time limit and has not made exceptions to cover any special cases.

We were referred to the provision contained in paragraph 16 of Schedule 1 to the Acquisition of Land (Authorization Procedure) Act, 1946, and to the decisions in *Woollett* v. *Minister of Agriculture and Fisheries*,[5] and in *Smith* v. *East Elloe Rural*

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[5] [1955] 1 Q.B. 103; [1954] 3 All E.R. 529; *reversing*, [1954] 1 W.L.R. 1149; [1954] 2 All E.R. 776.

*District Council.*[6] The language of the provisions now under consideration is, however, different, and, in my judgment, the decision in the present case depends solely upon the construction of the language used in the Act of 1954.

For these reasons I agree with the conclusions of the judge and I would dismiss the appeal.

PARKER L.J. By section 23 (1) of the Housing Repairs and Rents Act, 1954, where a dwelling-house is occupied by a statutory tenant and the landlord is responsible, wholly or in part, for repairs, then, subject to the provisions of Part II of the Act and to the existence of certain conditions (which are immaterial for the purposes of this case) the rent recoverable from the tenant shall be increased "if in accordance with the "Second Schedule to this Act the landlord has produced satis"factory evidence that work of repair to the value specified in "that Schedule has been carried out on the dwelling-house "during the period so specified."

By section 25 (1) it is provided: "No sum shall be recover"able by way of repairs increase unless the landlord has "served on the tenant or a former tenant of the dwelling-house "a notice in the prescribed form of his intention to increase "the rent (hereinafter referred to as a 'notice of increase'), "accompanied by—(*a*) a declaration in the prescribed form that "at the date of service of the notice the conditions justifying an "increase of rent were fulfilled; and (*b*) a declaration in the "prescribed form such as is mentioned in the Second Schedule "to this Act: and no such sum shall be recoverable before, or "in respect of any period before, such date as may be specified "in the notice."

Paragraphs 1 and 2 of the Second Schedule lay down the value of the repairs and the period during which they were carried out which the declaration must show if an increase in rent is to be obtained. [His Lordship read paragraph 4 (1) and paragraph 5 of the Second Schedule to the Act and continued:] In the present case a notice of increase and a declaration were served in October, 1954. The latter declared that during the three years ending on September 30, 1953, being within four years ending with the date of service of the notice of increase, work of repair had been carried out to the value of £566 6s. 2d., being as to £266 6s. 2d. decorative repairs, and as to £300 repairs wholly for the benefit of the dwelling-houses comprised in the building. Since £324 was the aggregate of the amounts of the statutory repairs deductions, an increase of rent was recoverable assuming repairs to that value had been done. The tenant, however, did not within 28 days apply to the county court to determine whether such work of repair had been carried out. She did nothing, but when sued in these proceedings for the increase of rent she sought to dispute the declaration on the ground that the alleged repairs to the value of £300 had never been executed, and that the declaration to that extent was false, and false to the landlords' knowledge. The answer put forward by the landlords was that by reason of paragraph 5 of the Second Schedule a declaration unchallenged within the 28 days becomes "satisfactory evidence" that the work of repair to the value specified in the declaration has been carried out, and that, accordingly, the increase of rent under section 23 (1) automatically followed and could not be disputed.

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[6] [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19.

For my part I am unable to accept this contention, at any rate in its widest form. The declaration to be valid does not merely have to show that the work of repair has been done within the specified period, and that its value is at least the value required in order that the increase in rent should operate. The declaration must also be in the prescribed form; and it must be served on the tenant; and the date specified in the notice of increase must not be earlier than six clear weeks after the service of the notice: compare section 25 (1), (2) and (3). Quite clearly the tenant must be entitled to challenge the validity of the declaration on the ground that one or more of these conditions have not been fulfilled. He cannot do this on an application to the county court under paragraph 4 of the Second Schedule, and it seems to me that the time to raise such a challenge to validity is when sued for the increase in rent.

Accordingly, the question here is whether the tenant is seeking to challenge the validity on some ground other than that repairs had not been carried out during the period specified to a value not less than that specified. That the tenant is seeking to challenge the validity on that ground is clear, but is she also seeking to challenge it on another ground? The contention on her behalf is that should she succeed in proving fraud on the part of the landlords the declaration would be a nullity, whereas mere proof that repairs had not been done to the value specified would not make the declaration a nullity but would merely make it cease to have effect. Therefore, it is said, the tenant is seeking to do something more than challenge the validity of the declaration on the ground that repairs had not been done to the value specified. I think that this contention is correct. No doubt it can be said that the real question in any case is whether repairs to the value specified have in fact been done, and that proof of fraud in the making of the declaration is merely proof of the quality of the act or its motive. Nevertheless, that quality, if proved, vitiates all transactions known to the law of however high a degree of solemnity. Suppose that on an application under paragraph 4 of the Second Schedule the landlord by fraud persuades the county court to uphold a declaration and that months later the tenant discovers this and is in a position to prove that fraud. Surely the tenant could refuse to pay the increase in rent, and when sued could allege that the decision of the county court was obtained by fraud. If that be the true position, why cannot a tenant who has not adopted the procedure of paragraph 4 equally claim that on proof of fraud the declaration is not satisfactory evidence for the purposes of section 23?

Reference was made on behalf of the landlords to *Woollett* v. *Minister of Agriculture and Fisheries*[7] and *Smith* v. *East Elloe Rural District Council*[8] in support of the view that the words in paragraph 5 of the Second Schedule were sufficient to exclude a challenge of the declaration on the ground of fraud. It is enough to say that the provisions excluding challenge in those cases were in much wider language, and I do not think that those cases assist in the determination of this case.

Finally, the tenant asserted that the declaration was invalid in that it was sent by post addressed to "Mr. E. G. Brasley" and not to Mrs. Violet Beasley. It, however, reached the tenant, and was understood by her to be intended for her. Indeed, she applied for and obtained a certificate of disrepair. I am satisfied that the misdescription in no way affects the validity of the declaration in this case. On the first ground, however, I would allow the appeal.

*Appeal allowed.*
*Judgment below set aside.*
*New trial ordered.*
*Leave to appeal to House of Lords refused.*

Solicitors: *Robert K. George; Chandler & Creeke.*

M. M. H.

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[7] [1955] 1 Q.B. 103.

[8] [1955] 1 W.L.R. 380.

END OF VOL. I

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2. —— *Larceny — " Takes " — Under mistake—Money paid in mistake of fact—Overpayment in wages packet—Employee intended by wages clerk to receive whole contents of packet—At time of taking packet no knowledge by employee that contents more than due—Subsequent discovery by employee of overpayment—Intent to appropriate overpayment—Larceny Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (2) (i).

Moynes *v.* Coopper - - **Divl.Ct. 439**

3. —— *Murder—Intention to kill or cause grievous bodily harm — Test of " reasonable " man "—Man of sub-normal intelligence—Death of child—Child shaken in fit of temper —Only intention to make child be quiet.*

Regina *v.* Ward - - - **C.C.A. 351**

**CROWN** — *Prerogative — Protectorate — Application in Kenya Protectorate—Grant of franchise of pontage—Formalities not essential—Crown exemption from payment of tolls for military personnel and families—" Mili- " tary "—Army Act,* 1881 (44 *&* 45 *Vict. c.* 58 *(as amended and re-enacted)*), *s.* 143.

*East Africa—Kenya Protectorate. Bridge—Toll. Military law.*

Nyali Ltd. *v.* Attorney-General . **C.A. 1**

**CROWN PRACTICE** — *Certiorari — Fraud, decision procured by — Bastardy — Affiliation order—Perjury by witness called by respondent —Whether certiorari will lie.*

*Bastardy.*

Regina *v.* Ashford, Kent, Justices. *Ex parte* Richley (No. 2) - - - **C.A. 167**

2. —— *Certiorari — Prejudice or bias — Quarter sessions—Appeal to quarter sessions against summary conviction — Attention of recorder drawn to passage in police report—*

**CROWN PRACTICE**—*continued.*

*Passage in report followed by list of previous convictions — Real likelihood of prejudice — Vagrancy Act,* 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

*Justices—Appeal to quarter sessions—Practice—Documents to be placed before the court. Justices—Bias or prejudice.*

Regina *v.* Grimsby Borough Quarter Sessions. *Ex parte* Fuller - **Divl.Ct. 36**

**DAMAGES** — *Personal injuries — Special damage—Loss of wages—Right to take into account value of any rights accrued or accruing in respect of industrial injury benefit, industrial disablement benefit or sickness benefit — " Injuries " — " Rights " — " Taken into " account "—National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62)—*National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 67)—*Law Reform (Personal Injuries) Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 41), *s.* 2 (1).

Flowers *v.* George Wimpey & Co. Ltd. **Devlin J. 73**

2. —— *Remoteness of damage—Company — Plaintiff injured owing to negligence — Plaintiff active director of private company—Loss of profits by company due to plaintiff's absence through injury—Plaintiff's receipts from company diminished accordingly—Claim for damages in respect of such loss.*

*Master and Servant—Per quod servitium amisit, action—Company—Loss of services of director. Company—Director.*

Lee *v.* Sheard - - - - - **C.A. 192**

**DISCOVERY.** See Practice.

**EAST AFRICA**—Kenya. See Crown.

**EVIDENCE**—*Cross-examination — Privileged statement — Previous signed statement made by witness—Witness cross-examined on parts of statement—Witness not contradicting parts of statement put to him—Whether privilege waived by cross-examination.*

Burnell *v.* British Transport Commission **C.A. 187**

2. —— Confession — Judges' Rules. See Military Law.

3. —— *Foreign tribunal — Jurisdiction of English court—Civil action in United States court—Request for examination of witnesses within jurisdiction of English court—Request for production of documents — Distinction between oral examination of witnesses and production of documents — Discovery against persons not parties to foreign suit—" Testi- " mony "—Power of court to make order in respect of material directly relevant to matters in issue in foreign court—Power of court to make order in respect of indirect material for the purposes of discovery—Foreign Tribunals Evidence Act,* 1856 (19 *&* 20 *Vict. c.* 113), *s.* 1.

Radio Corporation of America *v.* Rauland Corporation - - - - - **Divl.Ct. 618**

**FACTORY**—*Common law duty—Relevance of regulations — Painter falling from working platform—Statutory regulations applicable to platform at slightly greater height—Whether court may consider common law duty independently of statutory requirements — Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948, *No.* 1145), *reg.* 22 (*c*).
Chipchase *v.* British Titan Products Co. Ltd. - - - - - - - **C.A. 545**

2. —— *Criminal liability—Breach of regulation—Person not employed by factory occupiers killed as a result of a breach—Whether factory occupiers' liability to a penalty—Regulations for Use of Locomotives and Wagons on Lines and Sidings in or used in connexion with Premises under the Factory and Workshop Act,* 1901 (*S.R. & O.,* 1906, *No.* 679), *reg.* 14—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 133.
*Factory—Persons benefited by regulations.*
Stanton Ironworks Co. Ltd. *v.* Skipper **Divl.Ct. 255**

3. —— *Floor—Maintenance—Depression in floor filled by loose steel plate—Accident to workman—No breach of statutory duty unless floor unsafe—Safety a question of fact—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (1), 26 (1).
*Fact or law.*
Payne *v.* Weldless Steel Tube Co. Ltd. **C.A. 196**

**FOOD AND DRUGS** — *Food — Unfit for human consumption—Sale of bun containing piece of metal—Prosecution for sale of food " unfit for human consumption "—Charge not applicable—Food and Drugs Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 3, 9 (1).
J. Miller Ltd. *v.* Battersea Borough Council - - - - - - **Divl.Ct. 43**

2. —— *Food—Unfit for human consumption—Sale of loaf containing piece of string—Prosecution for sale of food " unfit for human " consumption "—Charge not applicable—Food and Drugs Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 3, 9 (1).
*Justices—Appeal to Divisional Court—Costs —Convicted defendant wins appeal—Power of Divisional Court to order him costs in court below.*
Turner & Son Ltd. *v.* Owen - **Divl.Ct. 48**

**FOREIGN TRIBUNALS.** See Evidence.

**HIGHWAY**—*Private street works—Improvements by local authority — Surface water drainage system laid down in private street in* 1923—*System vested in local authority—Proposed enlargement of system—Apportionment of expense on frontagers—Local authority satisfied or deemed to be satisfied with existing system—Whether local authority empowered to require frontagers to contribute to expense—Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 9 (1).
Poole Corporation *v.* Blake - **Divl.Ct. 206**

**HOSPITAL**—Status of board of governors. See Landlord and Tenant.

**INSURANCE** — *Marine — Cargo — " Inherent " vice " — " All risks from whatsoever cause " arising "—Institute Cargo Clauses (Wartime Extension), cl.* 6—*Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 55 (2) (*c*).
*Contract—Construction—Repugnancy.*
F. W. Berk & Co. Ltd. *v.* Style **Sellers J. 181**

**JOINT TENANCY**—Severance. See Trust and Trustee.

**JUSTICES** — *Appeal to quarter sessions — Notice of hearing—Appeal from dismissal of bastardy summons—Notice of date of hearing served on parties—Hearing adjourned sine die —Notice of date of adjourned hearing served on respondent by registered letter — Letter returned undelivered to clerk of peace—Meaning of " in due course give notice " of date for hearing — Whether " hearing " includes adjourned hearing—Whether sending by post sufficient where non-receipt proved—Summary Jurisdiction (Appeals) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 38), *s.* 3 (1)—*Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *ss.* 1, 26.
*Statute—Construction—Service of document by post—Meaning of " sent "—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 26. *Justices—Quarter sessions—Jurisdiction—Power to set aside own orders. Crown Practice—Certiorari—Absence of party—Order against him by inferior tribunal—No fair notice of proceedings.*
Regina *v.* County of London Quarter Sessions Appeals Committee. *Ex parte* Rossi - - - - - - - **C.A. 682**

2. —— *Appeals and committals to quarter sessions—Practice—Documents to be sent to quarter sessions.*
*Reg.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller* [1956] 1 Q.B. 36; [1955] 3 All E.R. 300 explained. Practice Note (Appeals and Committals to Quarter Sessions) - - - - - - **Divl.Ct. 451**

3. —— Bias. See Crown Practice.

4. —— Costs—Appeal to Divisional Court. See Food and Drugs.

**KENYA**—Toll. See Crown.

**LANDLORD AND TENANT**—*Act of* 1954—*Application for new lease—Application opposed by landlords on ground that they intend to occupy premises for business to be carried on by them therein—Landlords a hospital board of governors—Premises to be sold with vacant possession to Minister of Health for hospital uses—Whether intended occupation by board as agents of Minister for his business—Status of board affecting nature of occupation — " Business " of board—National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 12 (3),

**LANDLORD AND TENANT**—*continued.*

13 (1), 14—*Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (2), 30 (1) (*g*), 57.

*National Health Service—Hospital—Status of hospital board of governors — Whether agents of Minister—National Health Service Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 12 (3), 13 (1), 14.

*Possession—Land—Agent.*

Hills (Patents) Ltd. *v.* University College Hospital Board of Governors **C.A. 90**

**2.** —— *Act of* 1954—*Application for a new lease — Landlords unable to establish as of right any ground for opposing grant of new tenancy—Duration of new tenancy determined by court—Court's discretion to order grant of "such a tenancy as may be determined by "the court to be reasonable in all the circum- "stances" — Whether court precluded from considering "in all the circumstances" such grounds of opposition as landlords fail to establish as of right—Court's discretion unfettered —Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (2), 31, 33.

Upsons Ltd. *v.* E. Robins Ltd - **C.A. 131**

**3.** —— *Act of* 1954—*Business premises— —Application for new tenancy—Premises partially reconstructed after bomb damage—Landlords requiring possession for reconstruction—Agreement by landlords to grant building lease to third party — Building lessee to demolish and wholly reconstruct premises in accordance with landlords' requirements—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

Gilmour Caterers Ltd. *v.* St. Bartholomew's Hospital Governors - **C.A. 387**

**4.** —— *Act of* 1954 — *Business premises (Security of tenure)—Duration of new tenancy —Request by tenants in prescribed form for new tenancy "on terms of current lease"— Current lease for seven years — Whether "terms" in Act of* 1954 *includes duration— Duration by implication sufficient—Validity of request—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24 (1), 26 (3) (5), 29 (3), 35.

*Evidence — Document, to vary — Notice — Request for new tenancy in prescribed statutory form — Bona fide mistake in request — Whether parol evidence admissible to prove mistake — Request formal document with specific legal consequences — Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56).

*Estoppel—By conduct—Law, as to—Landlord and tenant—Request for new tenancy— Notice of opposition to new tenancy by landlords—Landlords' notice containing statement that tenants' request invalid—Whether landlords estopped in action for possession from asserting validity of request.*

Sidney Bolsom Investment Trust Ltd. *v.* E. Karmios (London) Ltd. - - **C.A. 529**

**LANDLORD AND TENANT**—*continued.*

**5.** —— *Act of* 1954—*Security of tenure— Tenancy at will—Tenant holding over in* 1953 *pending conclusion of negotiations for new lease—Demand for possession by landlord in* 1955—*Holding over during negotiations held a tenancy at will—Tenancy at will of business premises protected by Act—Landlord required to terminate tenancy in accordance with statutory provisions — Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23, 24, 25 (1) (2) (3) (4), 43, 69.

*Landlord and Tenant — Tenancy at will — Holding over—Pending negotiations for new lease—Purchaser in possession.*

Wheeler *v.* Mercer - - - **C.A. 274**

**6.** —— Joint tenancy — Severance. See Trust and Trustee.

**7.** —— *Rent restriction—Alternative accommodation — Dwelling-house required by landlord — Offer of council house in adjoining housing area — Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3.

Sills *v.* Watkins - - - **C.A. 250**

**8.** —— *Rent restriction—Possession application — Conditional order for possession against statutory tenant—Conditions not complied with by tenant—Death of tenant— Devolution of statutory tenancy on member of tenant's family—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*g*), 15 (1) —*Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4 (2).

Sherrin *v.* Brand - - - **C.A. 403**

**9.** —— *Rent restriction—Premium—Lease of dwelling-house within Rent Acts—Dwelling-house converted by lessee into two self-contained flats—Tenancy of converted dwelling-house assigned to plaintiff—Premium taken— Tenancy within Rent Acts despite conversion into two separate dwelling-houses—Premium recoverable by plaintiff—Landlord and Tenant (Rent Control) Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 (3).

Lower *v.* Porter - - - **C.A. 325**

**10.** —— *Rent restriction—Repairs and rent —Notice of increase and declaration as to repairs served on tenant — Declaration not challenged by tenant within* 28 *days — Whether tenant precluded after* 28 *days from challenging validity of declaration on ground of fraud—"Satisfactory evidence"—Particulars required in notice—Housing Repairs and Rents Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 23 (1) 25; *Sch. II, paras.* 4, 5, 6.

*Signature — Company — Rubber stamp — Whether effective. Company. Practice — Notice—Misnomer in—Housing Repairs and Rents Act*, 1954, *Sch. II.*

*Fraud—Party cannot rely on own fraud—*

**LANDLORD AND TENANT**—*continued.*

*Notice—Alleged fraudulent statement in—Validity—Housing Repairs and Rents Act,* 1954, *Sch. II.*
Lazarus Estates Ltd. *v.* Beasley **C.A. 702**

**11.** —— *Rent restriction—Repairs and rent—Repairs increase—Validity of notice of increase of rent—Prescribed form—Omission of part of calculation—Jurisdiction of court to permit amendment—Liability to do repairs—Tenant not liable—Notice of election by landlord—Effect on permitted repairs increase under Act of* 1920*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*d*)*—Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 23, 25 (3), (4), 30*—Housing Repairs (Increase of Rent) Regulations,* 1954 (*S.I.* 1954, *No.* 1036), *Schs.* 1, 4, 8.
Jackson *v.* Croucher - - - **C.A. 394**

**12.** —— *Rent restriction—Standard rent—Increase—" Improvement "—Old drainage and cold-water systems replaced by new—Defective area level adjoining building lowered—Whether " improvement " or " repair "—Test applicable—Improvement from tenant's point of view—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2 (1) (*a*)*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *Sch. I.*
*Fact or Law.*
Morcom *v.* Campbell-Johnson - **C.A. 106**

**13.** —— *Rent tribunal — Standard rent — Increase — " Services " — Meaning — Application by landlord for increase of rent—Rents increased by tribunal — Right of Divisional Court to interfere by certiorari—Costs—Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 40.
Regina *v.* Paddington North and St. Marylebone Rent Tribunal. *Ex parte* Perry - - - - - **Divl.Ct. 229**

**LOCAL GOVERNMENT**—*Local authority—Member of—Disqualification—Paid office " in " the gift or disposal " of local authority—Assistant master of county secondary school member of local council—Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 59 (1) (*a*).
Lamb *v.* Jeffries - - - **Divl.Ct. 432**

**LOUDSPEAKER ADVERTISING.** See Advertising.

**MASTER AND SERVANT**—Per quod—Company—Director. See Damages.

**2.** ——. See Negligence.

**MILITARY LAW**—*Court-martial—Jurisdiction—Investigation of charge—Request that charge be investigated by commanding officer at time of arrest—Charge investigated by commanding officer of regiment to which accused officer subsequently attached—" Commanding " officer " not necessarily commanding officer at time of arrest—Army Act (as re-enacted and amended)* (44 *&* 45 *Vict. c.* 58), *ss.* 45 (1) (5), 46 (1).
*Military Law — Evidence — Confession — Judges' rules — Accused officer ordered to attend interview with military police — No caution administered—Evidence of answers to questions put by military police admissible if given voluntarily—Whether voluntary or not question of fact for court-martial — Judges' rules not applicable to charges against military personnel. Criminal Law—Evidence—Confession—Judges' rules.*
Regina *v.* Harris-Rivett - **C.-M.A.C. 220**

**2.** ——. See Crown.

**MINES AND MINERALS**—*Coal—Statutory duty—Roof and sides—" To make roof and " sides of . . . working place secure "—New working place—Workman injured by fall of stone—" Repair "—Duty of employers to men engaged in providing secure roof and sides—Coal Mines Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 102 (8).
*" Working place "—" Reasonably practic-" able " to avoid breach of statutory duty. " Repair."*
Walsh *v.* National Coal Board **C.A. 511**

**MISTAKE**—Larceny. See Criminal Law.

**NATIONAL ASSISTANCE.** See Bastardy.

**NATIONAL HEALTH SERVICE**—Status of hospital board of governors. See Landlord and Tenant.

**NATIONAL INSURANCE**—*Contribution—Exception—" Income "—Whether net or gross income to be considered for purposes of exception from contribution — National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 5 (1) (*a*) (iii).
Longsdon *v.* Minister of Pensions and National Insurance - - **Havers J. 587**

**NEGLIGENCE** — *Onus of proof — Res ipsa loquitur — Inexplicable accident — Whether onus discharged if several possible causes proved consistent with absence of negligence—Proof of negligence.*
*Master and Servant.*
Moore *v.* R. Fox & Sons - - **C.A. 596**

**PRACTICE** — Appeal to Quarter Sessions — Documents. See Crown Practice.

**2.** —— *Discovery — Affidavit of documents conclusive—R.S.C., Ord.* 31, *r.* 12, *proviso.*
Edmiston *v.* British Transport Commission (Note) - - - - **C.A. 191n.**

**3.** —— *Parties — Joinder — Application by defendants to add further defendant—Allegation by plaintiff that confidential information*

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